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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1011

STATE OF ALABAMA ex rel. EUGENE SWEETON,
Chief of Police, City of Huntsville, Alabama

Petitioner,

vs.

GENERAL CORPORATION, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975
No. 75-

STATE OF ALABAMA ex rel. EUGENE SWEETON,
Chief of Police, City of Huntsville, Alabama

Petitioner,

vs.

GENERAL CORPORATION, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

The Petitioner, State of Alabama ex rel. Eugene Sweeton, Chief of Police, City of Huntsville, Alabama, respectfully prays that a writ of certiorari issue to review the judgment of the Alabama Supreme Court, entered on September 18, 1975 which reversed the Final Decree of Circuit Court Judge John D. Snodgrass, Madison County, Alabama entered on March 23, 1973, and remanded the cause for further proceedings not inconsistent with its opinion.

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OPINION BELOW

The opinion of the Alabama Supreme Court, filed on September 18, 1975, is reported in General Corporation v. State of Alabama ex rel. Eugene Sweeton, Chief of Police, City of Huntsville, Alabama, 320 So.2d 668, and a copy thereof appears in the Appendix to this petition at pages D-3 through D-19. A copy of the final decree of Circuit Court Judge John D. Snodgrass, entered on February 23, 1973, and a copy of the amendment to said decree, entered on March 23, 1973 appears in said Appendix at pages B-3 through B-5 and C-3 through C-7.

JURISDICTION

The judgment of the Alabama Supreme Court was entered on September 18, 1975. A copy of such judgment appears herein at Appendix E-3. On December 16, 1975, Associate Justice Lewis F. Powell, Jr. entered an order extending the time in which to file a petition for writ of certiorari, in this cause, to and including January 16, 1976. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

QUESTION PRESENTED

Whether the padlock penalty of the Alabama Red Light Abatement Act, Title 7, section 1091

et seq., Code of Alabama 1940, Recompiled 1958,[1/]

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1. The Alabama Red Light Abatement Act had its genesis at a time in history when "lewdness" of a different type (but involving the same procedural problems) was plaguing society. See Columbia Law Review at 604, which traces in part the history of such legislation:

> " 'RED LIGHT' INJUNCTION AND ABATEMENT ACTS. -- The strong arm of equity has lately found increasing employment through the enactment in thirty-eight states of 'Red Light' Laws for the abatement of disorderly houses. Modelled upon the liquor laws which originated in Iowa, these laws owe their enactment to the inadequacy of criminal prosecutions;
> . . .
> The effectiveness of the legislation lies in stringent provisions for abatement and in penalties for contempt.
> "This is clearly police legislation, designed to protect the public health and morals rather than to provide a remedy for injury to private property. For instance, the injunction is made binding upon the defendants throughout the jurisdiction of the court and frequently throughout the entire state. Not only are the costs of the action made a lien upon the premises; but in many states a 'tax' or fine is levied when the final injunction is issued. . . "

Today, forty-one of the 50 states have a statute which employs the "Red Light Abatement" pattern of enforcement. These can be broken down into three broad categories: (1) a few states, like Missouri, use statutory language which is clearly limited to houses of prostitution and which could not be interpreted to include any form of obscenity (M.R.S. section 563.130);

(This footnote is continued on the next page)

authorizing closure of the premises for a period of up to one year, can be constitutionally applied to a motion picture theater which has been found

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(2) eight states have adopted amendments and statutory language which specifically includes places dealing with obscenity in the operation of the statute, (these states are: Delaware Article 10, Chapter 72 of the Delaware Code added in 1974 to include places dealing in obscene motion pictures and books; Indiana, Section 9-2711 of the Indiana Code, added in 1973 to include places dealing with lewd, indecent, lascivious or obscene films; Kansas, Article 39 K.S.A. section 22-3901, added in 1970 makes "promoting obscenity" a common nuisance and subject to the Red Light type abatement procedures; Louisiana, amended Title 13 L.R.S. of 1950, section 4711 to include maintainance of obscenity as defined by the penal laws in the definition of nuisance; Nebraska, enacted Legislative Bill 815 in 1974 which provides in Section 15 that a place dealing in obscene films is a nuisance; Ohio, the definition of nuisance in O.R.S. 3767.01 et seq., enacted in 1961, has served as a model for other state's expansion of their Red Light Abatement statutes; Tennessee, section 23-301 of the Tennessee Code Annotated, amended in 1973 to include a place dealing in obscene films as being within the definition of a place of lewdness; Texas, articles 4666 and 4667 of the Texas Penal Code, effective January 1, 1974 specifically provide for the enjoining of the use of a premises for purposes of "commercial obscenity"; (3) other states, like Alabama, California, and Michigan have used statutory language like "lewdness, assignation or prostitution" in which, by judicial decision, the term "lewdness" has been given a broad meaning.

to be a public nuisance by reason of its having engaged in a course of conduct of exhibiting obscene motion pictures, daily, for a continuous period of five weeks, during which period eight films were exhibited, all of which were held to be obscene.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) First and Fourteenth Amendments to the United States Constitution.

(2) Alabama Red Light Abatement Act, Title 7, section 1091 et seq. Code of Alabama 1940, Recompiled 1958.

(3) Title 14, section 374(16j), Code of Alabama 1940, Recompiled 1958.

Copies of the above named provisions are set forth in Appendix F.

STATEMENT OF FACTS

A. The Bill of Complaint

A copy of the pleadings, entitled "Complaint and Application For Temporary and Permanent Injunction To Abate A Nuisance" appears herein at Appendix "A". The suit was filed on January 16, 1973 in the name of the State of Alabama by Eugene Sweeton, as a private citizen, pursuant to the provisions of the Code of Alabama 1940, Title 7,

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section 1093. Mr. Sweeton was and is the Chief of Police of the City of Huntsville. The bill of complaint (Tr. pp. 1-9) charged the Respondents with conducting a public nuisance by the exhibition of lewd and obscene motion picture films at the Fox Cinema Theatre in Huntsville. It was alleged that the Defendant General Corporation, the Respondent herein, was the operator of the business, and had operated said business for a period of time exceeding nineteen months before the filing of the bill of complaint; that the motion picture theatre had been open to, and soliciting, patrons from the general public; that the theatre was operated for profit; that the exhibition of the motion picture films referred to in the bill of complaint constituted a common law public nuisance, and a public nuisance as such term is defined in Section 1091 of Title 7 of the Code of Alabama 1940; that the exhibition of such films was in violation of the obscenity laws of the State; and that such obscene and lewd motion picture films were shown to the public so as to be offensive to public decency, morals, peace and health. The bill of complaint made specific reference, by name, to certain films which had been shown at Respondent's theatre from December 20, 1972, to January 9, 1973, inclusive, and also made reference to certain unnamed

features. Attached to the bill as exhibits were so-called "time and motion studies" of each of the films named in the bill, with the exception of films referred to in the paragraph numbered 12 of the bill as being entitled "Mermaids" and "Grabbers", which Respondent began exhibiting on or about January 10, 1973 (Tr. p. 4). The bill prayed for the issuance of a preliminary injunction, enjoining the Respondents from maintaining the alleged nuisance pendente lite, and closing the Fox Cinema against use by the Respondents as a motion picture theatre until decision upon the application for a permanent injunction, which was also prayed in the bill. The bill further prayed for an accounting of the box office receipts arising out of the exhibition of the motion picture films specifically referred to in the bill of complaint and prayed for an order that the Respondents appear with each of the films named in the bill and show cause why an injunction should not be issued and why an accounting should not be ordered of the box office receipts and forfeiture of the receipts to the State as contraband upon final determination of the cause. The bill further prayed that the Respondents be perpetually enjoined from exhibiting the motion picture films specified in the bill of complaint, and films of like or similar

kind of description, and that Respondents be enjoined permanently from maintaining the nuisance at the Fox Cinema and from maintaining such a nuisance elsewhere in the county. The bill further prayed judgment for costs of abating the nuisance, including attorney's fees and costs of investigating the charges made and in preparation of the case, and further prayed for general relief (Tr. p. 8).

B. Pre-Trial Procedure

Upon the filing of the bill of complaint on January 16, 1973, the trial court set a hearing on the application for a temporary injunction for January 26, 1973, and ordered the Respondents to produce at such hearing the motion picture film entitled "Mermaids" and the motion picture film entitled "Grabbers". The order was served upon General Corporation, through its agent, the manager of Fox Cinema, on January 16, 1973.

The Complainant, on January 16, 1973, further filed a motion with the trial court seeking an order directing Respondent to produce at the time and place set for a temporary injunction, and at the final hearing of the case, for use as evidence, the motion picture films entitled "Mermaid" and "Grabbers", which were then being shown at the Fox Cinema. The motion to produce

the films was set for a hearing by the trial judge on January 25, 1973, and a copy of the order setting the motion for hearing was served upon the Respondent on January 16, 1973 (Tr. p. 14). The hearing upon the motion to produce the films was duly continued, ex mero motu, from time to time, (Tr. p. 15, Tr. p. 16).

On February 13, 1973, Petitioner amended the original bill of complaint by naming and properly indentifying the Respondent "Mary Roe" as Jean Phillips, the manager of Fox Cinema (Tr. p. 18). The amendment also added paragraph 12 (A) to the original bill of complaint, which attached to the bill, as appendices, "time and motion studies" of the "Mermaids" and "Grabbers" films (Tr. p. 18).

On February 13, 1973, Respondents General Corporation and Jean Phillips filed a written motion to strike certain portions of the original bill of complaint, as amended (Tr. p. 22), and filed their answer to the bill (Tr. p. 23). Also on February 13, 1973, Respondents General Corporation and Jean Phillips filed a joint demurrer to the original bill of complaint, setting forth approximately twenty-eight grounds (Tr. pp. 24-28). The trial court, on February 13, 1973, entered a pre-trial order pursuant to Equity Rule 38 (Tr. pp. 28-29), outlining

the agreed issues of the case, and reflecting the stipulation of the parties that admission to the Fox Cinema was gained by patrons paying admission into an enclosed theatre; that the movie house was an "adult" movie house, and that no question was submitted to the court with regard to a determination of whether films were shown to minors; that, without the Respondents waiving their motions to strike or demurrers, the court would proceed with the viewing of the films alleged in the complaint and made the subject of the motion to produce; and that the other issues raised in the complaint, such as the accounting, attorneys' fees, and costs, were to be severed until a determination was made on the issuance of the preliminary injunction (Tr. p.29).

The trial court, on February 13, 1973, overruled the Respondent's motion to strike certain portions of the bill of complaint and overruled the Respondent's demurrer to the original bill (Tr. p. 30).

C. THE TRIAL

On February 15, 1973, the case came on to be heard before the court upon the application for a temporary injunction (Tr. p. 33).

The two motion picture films "Mermaids"

and "Grabbers" referrred to in paragraph 12 of the original bill of complaint, (Tr. p. 4, Tr. p. 18), were produced by Respondent General Corporation pursuant to subpoena duces tecum, motion to produce, and order of the trial court, and by agreement of the parties, the court viewed the two films on the premises of the Fox Theatre (Tr. p. 35).

Mr. Ron Curlee, a Detective for the Huntsville Police Department, was sworn and testified that during the period December 20 through December 26, 1972 he viewed a film entitled "The Making of the Blue Film " and another untitled "feature" at the Fox Cinema theatre (Tr. p. 36); that on December 27, 1973 he viewed the feature "Mary Jane" and a feature entitled "The Gun Runners"; that on January 4, 1973 he again viewed the film entitled "Mary Jane" and a feature entitled "I am Sandra"; and that on January 10, 1973 he viewed a film entitled "The Executive Wives" and a film entitled "The Mermaid". (Tr. p. 37). Mr. Curlee said that the feature "I am Sandra" had another title which was "The Making of a Woman". (Tr. p. 38). He paid an admission charge of three dollars (Tr. p. 38) and on each occasion that he viewed films at the Fox he was accompanied by Mr. Evans, another police officer (Tr. p. 38).

Mr. Curlee related in detail the substance of the film entitled "The Mermaid" (Tr. pp. 39-42). He stated that at the time of his visits to the theater he used a camera and made photographs of the films which he viewed (Tr. p. 42) using the following procedure:

> "I also had a tape recorder and the microphone of the tape recorder was plugged into the camera. Each time the camera clicked, it was recorded on the tape recorder. In other words, each time a frame was made, it was recorded on the tape recorder. The tape recorder was turned on at the beginning of the film, and at a later date you could take the tape recorder with a stop watch and turn the tape recorder on at the same time and start the stop watch, and each time you heard a click, record on a piece of paper the amount of time that it was into the recording."

He stated that thereafter he prepared exhibits and a "time-motion study", using the photographs which he took of "The Mermaid" (Tr. p. 43). The exhibits were marked as 4-A for the Plaintiff and the sound track of the tape recordings of the film were marked as Plaintiff's Exhibits 4-A-T(1) and 4-A-T(2) (Tr. p. 43). The labels on the Exhibits marked 4-A were prepared by Mr.

Curlee and record the serial number and the timed sequence of each scene in the film which the photographs depict (Tr. p. 43).

The same procedures were followed by Mr. Curlee in his viewings of the other films. Time and motion studies made by Mr. Curlee in like manner to those made by him in connection with the film "The Mermaid" were made in connection with each of the films referred to in the original bill of complaint and were offered into evidence. Mr. Curlee summarized in his testimony the content of each of the films referred to in the original bill, and the sound tracks of each of the films, which had been made by Mr. Curlee, were offered and accepted into evidence.

Mr. Curlee said that he attended the viewing of the film by the court at the Fox Theatre, and the film viewed by the court was the same which he viewed at the Fox Cinema during the week of January 10, 1973 (Tr. pp. 43-44).

By stipulation of the parties, copies of advertisements published in the Huntsville Times, a newspaper of general circulation in Madison County, advertising the theatre fare exhibited by the Fox Cinema for the period December 20, 1973 through January 10, 1973, were offered into evidence (Tr. pp. 85-86).

Mr. Charles O'Reilly, Jr., Advertising

Director of The Huntsville Times, was sworn and testified as a witness (Tr. p. 86). Mr. O'Reilly testified that the Huntsville Times billed Charles Outland and Respondent General Corporation, otherwise known as Southern Investment Theatre Group, for the advertising charges (Tr. pp. 88-89). Mr. O'Reilly said that the newspaper did not solicit the advertisements, which were placed by Respondent General Corporation, otherwise known as Southern Investment Theatre Group (Tr. pp. 90-91).

A photograph, which is marked as Plaintiff's Exhibit 10, depicting the Fox Cinema as it appears from the street on which it is situated, was offered and accepted into evidence (Tr. p. 93).

Respondent Jean Phillips was sworn as a witness for Complainant (Tr. p. 94) and testified that she had been manager of the Fox Cinema since January 13, 1973, and that she had been continuously employed by the Fox Cinema from January 1972 to the time of the hearing (Tr. pp. 94-95). Mrs. Phillips testified that during her tenure as manager of the Fox she had received her instructions in connection with the operation of the business from Floyd G. Bradford, of General Corporation, and Charles E. Outland, President of General Corporation, both of whom were

named as Defendants in the case (Tr. p. 98). She said that daily and weekly reports of the box office receipts were mailed by her, addressed to General Corporation, at 423 Broadway, Nashville, Tennessee (Tr. p. 99). Mrs. Phillips said that the local depository for the Fox Cinema receipts was an account in the Henderson National Bank of Huntsville, Alabama, and that the account was in the name of General Corporation (Tr. p. 100). Mrs. Phillips further testified that she had nothing to do with determining what films would be shown by the Fox Cinema and that she did not know exactly who did, but that she received booking slips from a firm known as Jaco Film Enterprises of Atlanta, Georgia (Tr. pp. 100-101). She said that the films were delivered to the Fox Cinema by a firm known as Theatre Services, which had a key to the building (Tr. p. 101). She said that the checks for the expenses of the theatre were drawn by General Corporation and were signed by the Defendants Outland and Bradford (Tr. p. 102).

The Respondent Theater did not put on any evidence.

On February 22, 1973, the trial court entered a supplemental pre-trial order (Tr. p. 121). The supplemental pre-trial order, among other things, reflected the stipulation of the parties

that the issues in controversy were:

(a) whether the conduct of the Respondents in showing film as alleged in the complaint in enclosed theatres, where admission is gained by adult patrons by paid admission, is sufficient to constitute lewdness as provided in Title 7, Section 1091 of the Code of Alabama, and

(b) "If the Respondents have conducted a public nuisance, the Petitioner and Respondents have agreed that the issues heretofore severed may be submitted to the court as a matter of law for the purpose of a final decree* * *."

The severed issues consisted of the question of (1) attorneys fees for the prosecution of the case, (2) whether the Petitioner, Sweeton, was entitled to his costs and expenses in preparation of the suit, and (3) whether the Complainant was entitled to an accounting of the box office receipts and forfeiture of same (Tr. pp. 121-122).

On February 22, 1973, Respondents General Corporation and Jean Phillips submitted the case for decree on the original bill, answer of Respondents, pre-trial orders, and the testimony, exhibits, and stipulations offered by Complainant at the oral hearing upon the application for a temporary injunction (Tr. p. 122). The Respondents,

General Corporation and Jean Phillips, submitted the case for final decree upon their answer to the original bill as amended, pre-trial orders, and the evidence taken orally before the court upon the hearing of Complainant's application for a temporary injunction (Tr. p. 123).

On February 23, 1973, the trial court entered its final decree (Tr. pp. 123-124), a copy of which appears herein at Appendix B. In its decree, the trial court found that the Defendant General Corporation was the operator of the Fox Cinema and that Respondents had shown obscene movies, as defined by Title 14, Section 374 (16) (j) et seq., of the Code, and as defined by Roth vs. United States, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304, "or by any other standard that this court is aware." The trial court further found that "obscene" means "lewd", and that "lewd" means "obscene". The trial court found that the Respondents had operated their theatre so as to constitute a public nuisance, and that "no intent was shown by the Respondents to operate their place of business other than as a public nuisance nor that they had ever operated said theatres in any other manner". The decree perpetually enjoined the Respondents from maintaining a nuisance at 205 East Side Square, Huntsville, Alabama, or elsewhere in Madison County, and

closed the theatre for any purpose for the period of one year "unless sooner released pursuant to Title 7, Section 1104, Code of Alabama 1940." The decree further directed sale of the personal property and contents used in conducting the nuisance, and directed that the proceeds of the sale of the personal property be applied in payment of the costs of the action and the costs of abatement (Tr. p. 124).

Pursuant to the terms of the final decree, and in conformity with it, a permanent writ of injunction was issued against the Defendants General Corporation and Jean Phillips on February 24, 1973 (Tr. pp. 128-129), which embodied the terms of the Court's final decree.

On March 2, 1973 a claim was made for some equipment (Transcript, p. 129).

On March 23, 1973, on motion of the Complainant, the trial court filed an amendment to the final decree, a copy of which appears herein at Appendix "C". The amendment, in effect, rewrote the decree (Tr. pp. 130-132), and specifically limited the operation of the permanent injunction to forms of speech or expression which would be "obscene", as defined by controlling decisions of the Supreme Court of the United States, or by the Supreme Court of Alabama, "whichever definition shall be less

restrictive." (Tr. p. 131).

Coca Cola Company filed on April 10, 1973 for certain personal property (Tr. p. 137). On April 17, 1973, Coca Cola Company was allowed to reclaim its personal property (Tr. p. 139).

An Appeal was duly taken to the Alabama Supreme Court (Tr. p. 139), and a cost bond was filed by Defendant General Corporation on August 23, 1973.

On September 18, 1975, the Alabama Supreme Court handed down its decision upholding the contentions of the petitioner herein on all of the trial issues (including those involving statutory construction) with one exception---that regarding the Respondent's federal constitutional claim that the "padlock" penalty of the Alabama Red Light Abatement Act was a "prior restraint" on free speech. More specifically, the Court held in favor of the petitioner on the following issues:

(1) The definitional infirmities in the Alabama Red Light Abatement Act were cured by the trial judge's incorporation of the Roth standard for obscenity (Title 14, section 374 (16j)) into the Red Light Abatement Act, and the judicial construction given by the Alabama Supreme Court to that statutory definition in Pierce v. State, 292 Ala. 473, 296 So.2d 218

(May 9, 1974).

(2) Since the broad language of the Red Light Abatement Act gave no indication as to the legislative intent to either include or exclude its application to obscene material, the prior construction given to that statute (i.e., that it was declaratory of the common law) was controlling, and such public exhibition of obscenity came within its ambit, since acts at common law which were contrary to public morals were considered to be public nuisances and subject to abatement as such.

(3) The burden of proof required by the statute is upon the people, and does not shift and, in the cause herein, the people did in fact meet their burden.

(4) The requirement of a prompt judicial review of any administrative or executive suppression was met. The Act does not allow, nor was there, in fact, any suppression of the Respondent's activities until after a final adjudication on the issue of obscenity.

(5) The allowance of the issuance of a preliminary injunction after the filing of the complaint was not an infirmity, since a hearing must be had thereon within 10 days, and the defendant must be given at least five days notice prior to such hearing. Further, under section

1103 of the statute, a final adjudication on the ultimate issue of obscenity takes precedence over all other cases, except injunctions.

(6) There was ample evidence for the trial judge to conclude that the motion pictures in question were obscene.

At the same time, however, the Court ruled that even where, as in this case, there was ample evidence for the trial judge to conclude that the motion pictures in question were obscene, and that the theater was guilty of maintaining an obscenity nuisance, nevertheless, the "padlock" penalty could not be applied, because to padlock the theater's operations for one year would constitute a prior restraint, in violation of the federal constitution.

REASONS FOR GRANTING THE WRIT

The Federal Question Is Substantial

In past Terms, the public nuisance approach to this nation's obscenity problems has been before this Court in a number of cases:

1972 October Term

(1) Grove Press Inc. v. Flask, ("I Am Curious (Yellow)"), 326 F.Supp. 574, (Mar. 10, 1970) vacated and remanded in Grove Press Inc. v.

Flask, (70-1) 413 U.S. 902, 37 L.Ed.2d 1013, 93 S.Ct. 3026 (June 25, 1973).

(2) A Motion Picture Film Entitled "Vixen" v. Ohio ex rel Keating, ("Vixen") 27 Ohio St.2d 278, 56 Ohio Ops.2d 165, 272 N.E.2d 139, vacated and remanded in A Motion Picture Film Entitled "Vixen" v. Ohio ex rel. Keating, (71-599), 413 U.S. 905, 37 L.Ed.2d 1016, 93 S.Ct. 3033 (June 25, 1973).

(3) Gulf States Theatres of Louisiana Inc. v. Louisiana ("The Stewardesses"), 264 La. 44, 270 So.2d 547 (Dec. 18, 1972), [2/] vacated and remanded in Gulf States Theatres of Louisiana

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2. The uncertainty which is developing as a result of this Court's inaction in this area is pointed up by the final result reached in Gulf States Theatres of Louisiana, Inc. v. Louisiana, supra. In its original opinion in 270 So.2d 547, the Louisiana Supreme Court had upheld the Louisiana Red Light Abatement Act, its application to the film "The Stewardesses", and the "padlock" penalty. When this Court remanded all of the obscenity cases, following its ruling on June 21, 1973 in Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, a change of membership had taken place on the Louisiana Supreme Court and the new majority of that court, upon remand, declared both the Louisiana obscenity laws and the Red Light Abatement Act's obscenity application to be invalid. A major authority in support of the public nuisance concept suddenly became a major authority against its application. See 287 So.2d 496, supra, (Dec. 3, 1973).

Inc. v. Louisiana (72-1221), 413 U.S. 913, 37 L.Ed.2d 1036, 93 S.Ct. 3063 (June 25, 1973).

(4) Lawrence S. Huffman, as Prosecuting Attorney for Allen County, Ohio, et al. v. U.S. District Court for the Northern District of Ohio, Western Division, et al. (motion picture theater course of conduct--16 films in a two month period), (No. 72-1613), Application for stay or writ of injunction denied in 413 U.S. 918, 37 L.Ed.2d 1039, 93 S.Ct. 3068 (June 25, 1973).

1973 October Term

(1) Speight T/A Harem Book Store v. Slaton (Book store), 356 F.Supp 1101 (Feb. 22, 1973). Probable jurisdiction noted in Speight et al. T/A Harem Book Store v. Slaton etc., et al., (No. 72-1557) 414 U.S. 815, 38 L.Ed.2d 48, 94 S.Ct. 129 (Oct. 9, 1973), vacated and remanded in Speight T/A Harem Book Store et al. v. Slaton etc., et al., (No. 72-1557) 415 U.S. 333, 39 L.Ed.2d 367, 94 S.Ct. 1098 (Feb. 27, 1974).

(2) Lawrence S. Huffman as Prosecuting Attorney for Allen County, Ohio et al. v. Pursue Ltd. (Motion picture theater course of conduct -- 16 films in a two month period) (No. 73-296). Probable jurisdiction noted and set for oral argument in tandem with No. 73-1119 in 415 U.S. 974, 39 L.Ed.2d 870, 94 S.Ct. 1559 (Mar. 18, 1974).

(3) MTM, Inc. et al. v. William J. Baxley etc., et al. (Motion picture theater course of conduct) (No. 73-1119). Probable jurisdiction noted and set for oral argument in tandum with No. 73-296 in 415 U.S. 975, 39 L.Ed.2d 870, 94 S.Ct. 1559 (Mar. 18, 1974).

(4) Louisiana et al. v. Gulf States Theatres of La., Inc. et al. ("The Stewardesses") 287 So.2d 496 (Dec. 3, 1973), petition for writ of certiorari denied in Louisiana et al. v. Gulf States Theatres of Louisiana, Inc., et al., (No. 73-1458) 417 U.S. 911, 41 L.Ed.2d 215, 94 S.Ct. 2610 (May 28, 1974).

1974 October Term

(1) Lawrence S. Huffman as Prosecuting Attorney for Allen County, Ohio et al. v. Pursue Ltd. (Motion picture theater course of conduct -- 16 films in a two month period) (No. 73-296), vacated and remanded in Lawrence S. Huffman, as Prosecuting Attorney for Allen County, Ohio et al. v. Pursue Ltd, ___ U.S. ___, 43 L.Ed.2d 482, ___ S.Ct. ___ (Mar. 18, 1975).

(2) MTM, Inc., et al. v. Baxley, etc. et al. (Motion Picture Theater course of conduct (No. 73-1119), vacated and remanded in MTM, Inc., et al., v. Baxley, etc., et al., ___ U.S. ___, 43 L.Ed.2d 636, 95 S.Ct. ___ (Mar. 25, 1975).

(3) Art Theater Guild Inc., et al. v. Ohio ex rel. Ewing ("Without A Stitch") 37 Ohio St.2d 95, 307 N.E.2d 911 (Feb. 27, 1974), appeal dismissed for want of a substantial federal question in Art Theater Guild Inc., et al., v. Ohio ex rel. Ewing (No. 73-1973) ___ U.S. ___, 44 L.Ed.2d 82, ___ S.Ct. ___ (April 21, 1975).

(4) Marks et al. v. Leis (Book store) (unreported), vacated and remanded in Marks et al. v. Leis (No. 74-793) ___ U.S. ___, 44 L.Ed.2d 96, ___ S.Ct. ___ (April 28, 1975).

(5) Art Theater Guild, Inc. et al., v. Ohio ex rel. Schoen ("The Stewardesses" and "History of a Blue Movie")(unreported), appeal dismissed for failure to file a timely notice of appeal in Art Theater Guild, Inc. et al. v. Ohio ex rel. Schoen (No. 74-955) ___ U.S. ___, 44 L.Ed.2d 445, ___ S.Ct. ___ (May 12, 1975).

(6) Art Theater Guild, Inc. et al. v. Ohio ex rel. Robert J. Anderson ("Deep Throat")(unreported) appeal dismissed for failure to file a timely notice of appeal in Art Theater Guild, Inc., et al. v. Ohio ex rel. Robert J. Anderson (No. 74-956) ___ U.S. ___, 44 L.Ed.2d 445, ___ S.Ct. ___ (May 12, 1975).

1975 October Term

(1) Nihiser v. Sendak, No. 73 F. 93 ("Deep Throat") (N.D. Ind. Nov. 14, 1974) (No. 74-1165)

vacated and remanded in Sendak, etc., v. Nihiser, dba Movieland Drive-In Theater, ___ U.S. ___ S.Ct. ___ (Nov. 17, 1975).

A review of the files in the above appeals will demonstrate that, in none of these cases, has the critical "padlock" issue of the Red Light Abatement Act been drawn as clearly in focus. With the single exception of the constitutional issue as to whether the "padlock" penalty constitutes a "prior restraint" in violation of the First Amendment, the decision of the Alabama Supreme Court below upheld the petitioner's claims on all of the trial issues involving the Red Light Abatement Act, including those State issues involving statutory construction.

The merits of the public nuisance approach, and the critical question as to whether or not the "padlock" penalty of the Red Light Abatement Act is in derogation of federal rights, are "burning" issues in a number of other states. See Busch et al. v. Projection Room Theater et al., 118 Cal.Rptr. 428 (Dec. 27, 1974), hearing granted on March 10, 1975 in L.A. No. 30518 and argued to the California Supreme Court on June 18, 1975; State of Michigan ex rel. Cahalan v. Diversified Theatrical et al., 229 N.W. 2d 389 (Mar. 4, 1975) hearing granted and argued in the Michigan Supreme Court in

November 1975; Oklahoma v. Stephen Hess dba Venus Book Mart et al., ___ Okla. ___, ___ P.2d ___ (Sept. 16, 1975); Commonwealth of Pennsylvania v. McDonald, ___ Pennsylvania ___, ___ A.2d ___ (Oct. 30, 1975); Universal Amusements Co., Inc. et al. v. Carol Vance et al., In the U.S. District Court for the Southern District of Texas, Houston Division, ___ F.Supp. ___ (20 consolidated cases) (October, 1975). A timely decision by the Court on the critical issue in this case will obviate a great deal of additional litigation on the same issue in other state and federal courts.

II

AS APPLIED TO THE FACTS HEREIN, THE ALABAMA RED LIGHT ABATEMENT ACT INVOLVES NOTHING MORE THAN A REAL PROPERTY INTEREST AND THE APPLICATION OF A STATUTORY PENALTY. IT DOES NOT PRESENT A FIRST AMENDMENT QUESTION.

From the earliest days of Anglo-Saxon law, a moral nuisance has been abatable as a public nuisance. See "The Law of Nuisances" by H.G. Wood at sections 23 and 24, "Acts affecting public morals, public nuisances per se." Joyce, in his treatise on the Law of Nuisance, points out that, under the common law, the municipal corporation not only has the right, but it also

has the obligation to remove the moral nuisance and, in this regard, this Court has stated in Phalen v. The Commonwealth of Virginia, 12 L.Ed. 1030, 1033 (1850) that "It is a principle of the common law, that the king cannot sanction a nuisance. . ." See also Rex v. Curl, 2 Strange 789 (1727) and Sir Charles Sedley's case 1 Sid 168.

The "padlock" power being exercised by law enforcement in the Alabama Red Light Abatement Act is one of the most basic powers of local government--the power in aid of its duty to protect the public morals of the local community against public conduct which "government" regards as malum in se. The Alabama Legislature has determined that the "padlock" power should be applied where "public lewdness" has been established as a regular course of conduct. To frustrate that legislative determination would constitute an unconstitutional abridgment of fundamental rights under the federal constitution. Mugler v. Kansas, 123 U.S. 205 at 210 (Dec. 5, 1887).

The record clearly establishes the existence of a moral nuisance. One need only casually examine the time-motion studies of the eight films which were pleaded by incorporation as Appendices 1A, 1B, 2A, 2B, 2C, 3A, 3B, 4A and

4B to the Complaint, (See Appendix A-8 herein), or examine the specific pleadings on "lewdness" at paragraph 15(c) therein. (See Appendix A herein, at pages A-11 through A-13. Petitioner's cause of action does not arbitrarily refer to isolated circumstances but, on the contrary, describes a continuing course of conduct which involves weekly "film selection". Paragraph 9 alleges that "for a period of time in excess of 19 months, the Respondents, through the Fox Cinema Theater, have consistently shown lewd and obscene motion picture films in the City of Huntsville, County of Madison, which films have violated the laws of the State of Alabama . . ." In support of that general allegation, the pleading thereafter sets forth, in paragraphs 10(a), 10(b), 10(c) and 12, a continuous course of conduct extending from December 20 through December 26, December 27 through January 2, January 3 through January 9, and January 10th and thereafter (see Appendix A herein, at pages A-7 and A-8).

On this appeal, Petitioner emphasizes that, in the face of this record, the respondent offered no evidence, whatsoever, to rebut the petitioner's proof which was admitted in evidence in support of the complaint. What emerges from the Alabama Supreme Court's ruling in this case

is a broad rule of law that, under no circumstances, may the "padlock" penalty be applied when "lewdness" is presented to the public in filmed portrayals! The fallacy of that reasoning is clearly and logically explained in the opinion of Associate Justice Burke, speaking for the majority of the New York Court of Appeals in Trans-Lux Dist. Corp. v. Bd. of Regents, 248 N.Y.S.2d 857, (Mar. 26, 1964). To so hold, would be an infringement upon the legislative powers of government, regarding public nuisances, stated above.

The essence of the Alabama Supreme Court's erroneous ruling is its conclusion that, even though a public nuisance had been found to exist at the theater, based upon a daily course of conduct extending over a period of five weeks and involving the exhibition of a multitude of obscene motion picture films, still the state court could not apply a statutory one year padlock penalty against the property because such penalty would also operate against the theater operator personally and, in thus preventing him from showing films at that location in the future, which might be constitutionally protected, would constitute an unconstitutional prior restraint. By thus riveting its attention to the prior restraint "in personam" implications

of Near v. Minnesota, 283 U.S. 697, 75 L.Ed. 1357, 50 S.Ct. 625, the Court lost sight of the fact that the Alabama Legislature had undertaken in the Red Light Abatement Statute to provide what, unquestionably, is an "in rem" and not an "in personam" remedy. It should be noted, in this regard, that in other parts of its opinion, the Court took note of the special function of the nuisance action. See General Corporation v. State ex rel. Sweeton, 320 So.2d 668 at 673 where the Court noted, in considering the burden of proof issue:

> . . .there is a dichotomy in the social ills against which obscenity law and public nuisance law are directed. The definitional test for obscenity attempts to separate those materials protected by the guaranties of freedom of expression; the aim of a nuisance action, on the other hand, is not the suppression of a particular form of expression, rather the abatement of a condition which works harm upon a substantial number of the public or which injuriously affect public safety, health, or morals. City of Selma v. Jones, 202 Ala. 82, 79 So. 476 (1918). (Our emphasis.)

The "in personam" provision, which troubled the Alabama court is not an essential part of the statutory scheme and should have been disregarded by that Court under the paramount rule of statutory construction which requires a Court to ascertain and, where possible, give effect

to the intent and purpose of the legislature, as expressed in the statute. 82 C.J.S. Statutes, page 560.

The erroneous conclusion which was reached by the Alabama Supreme Court can be isolated by examining the contrary conclusion which must be reached, when an attack is made upon the same moral nuisance from a less powerful source; namely, the power which resides in a landlord, incident to his ownership of the land upon which the moral nuisance is located. A case involving this general principal was recently reported as a news item in the Hackensack, New Jersey Record in October of 1975. In that case, Arnd Bollhardt and Stuart Shaw, partners in Reality Alliance, Inc., which leased premises from Fazio for an adult bookstore, were evicted by Landlord Fazio in a civil lawsuit in ejectment, brought by landlord Fazio for their having violated the terms of the lease (see Hackensack, N.J. Record of October 15, 1975). Upon District Court Judge Gerald E. Monaghan's ruling on September 16, 1975 that the store's sexual materials violated state obscenity laws, a judgment was entered voiding the lease and ejecting the tenants. After the trial, State Supreme Court Justice Morris Pashman granted an emergency stay which permitted the store to stay open pending an

appeal. On October 14, 1975, the New Jersey Supreme Court, by a vote of 5-2, lifted the stay, requiring the bookstore to close while its appeal was pending (Hackensack, N.J. Record of October 16, 1975). If closure can thus be accomplished through application of "Hornbook Law" legal principles relating to the Landlord-Tenant relationship, what justification can be found for arriving at a different result, where an attempt is made to employ municipal powers relating to the civil abatement of public nuisances?

Petitioner submits that the proper construction of the "padlock" provision of the Alabama Public Nuisance Abatement Act is the rationale expressed by the three judge U.S. Federal District Court for the Southern District of Ohio, Western Division, in a case involving a book store, in Cincinnati Properties Inc. et al. v. Leis et al., (unreported) (May 2, 1974), judgment vacated and remanded on other grounds in Marks v. Leis, ___ U.S. ___, 44 L.Ed.2d 96, ___ S.Ct. ___ (April 28, 1975), and by a majority of the Court of Appeal, Fourth District, Second Division, in a case involving "entertainment" in People ex rel. Hicks v. "Sarong Gals", 42 Cal.App.3d 556, 117 Cal.Rptr. 24 (Oct. 18, 1974) hearing denied by the California Supreme Court on December 11, 1974.

A. The Rationale Employed in Cincinnati Properties Inc., et al. v. Leis et al.

In the Cincinnati Properties, Inc. case, supra, the Court was faced with the identical issue, except that there the three judge Federal Court was considering an application of the "padlock" provisions of the Ohio Public Nuisance Statute, (O.R.C. sections 3767.01 et seq.) to an adult book store. In upholding the "padlock" provision, that Court stated:

> "The plaintiffs' constitutional argument is this: A person is operating a book store containing a thousand different items each concedely presumptively protected by the First Amendment - a fair sampling of the 1,000 produces 50 which are subsequently the subject of an adversary judicial proceeding and found to be obscene. Any state remedy applied to the facts which prevents the operator from staying in business at that location and selling the other non-judicially examined materials is a prior restraint on the sale of those materials and therefore violates the First Amendment. We do not agree. The argument overlooks the right of the State, within constitutional bounds, to declare or define public nuisances and abate them. A state may,

of course, in the exercise of its police powers, prohibit certain conduct. It is not questioned - whatever the difficulties of ascertainment - that the states have power to prohibit obscenity and, within the Miller limits, to determine what is and is not. Kingsley v. Brown, 354 U.S. 436 (1967); United States v. Reidel, 402 U.S. 351 (1971); Miller v. California, 413 U.S. 15 (1973); Paris v. Slaton, 413 U.S. 49 (1973). Nor is it questioned that a state, having judicially determined that a given product is obscene, may validly enjoin the sale of that product by an individual, provide for its destruction and/or provide criminal sanction. The fallacy of the plaintiffs' position is somewhat indicated by this simple example: A person possessing for sale one copy of one book concedely obscene and ten copies of a concedely non-obscene book is imprisoned for the former- during the term of imprisonment he is effectively stopped from dealing in non-obscene materials. Surely, it would not follow that the imprisonment was unconstitutional because it was a prior restraint respecting the innocent materials."

"From time immemorial states have

chosen, in the exercise of their police power, to define certain action as illegal and, in addition, to define the place where certain prohibited activity is carried on as a "nuisance". The attendant remedy provided in such nuisance cases has been one against the place in which the activity has been carried on. This record is clear that the business of selling books and materials and offering shows was being carried on in the involved locations (see, for instance, the hundreds of publications contained in the "Inventory" involved in No. 8714 (copy of the state court record attached to defendant Conroy's motion for summary judgment). No one questions that the sampling was a fair one and that sampling produced what is 100%, on this record, illegal and unprotected obscenity."

"The State of Ohio has seen fit to define as a nuisance, subject to abatement, a place in which obscenity is conducted. There being no question of fact that a business of obscenity was carried on, the question in this case is, therefore, really whether the State may validly define the operation in the place as a nuisance and close it for a year - padlock it - on that

basis. If it can, there is no prior restraint of the non-judicially-viewed material, except purely incidental. As Mr. Justice Frankfurter said in Kingsley, at page 441, "the phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties:

'What is needed', writes Professor Paul A. Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.' "

"The constitutional power of the State to abate what has been appropriately defined as a public 'nuisance' has never been seriously questioned. 'Padlock' remedies have been consistently provided for by most states in the areas of prostitution, gambling, and liquor violations. It is not for us to conclude that one or the other of these subjects vis-a-vis the

State's padlock power should be classed differently than obscenity. Each is a proper object of the police power and not unrelated. To quote again from Kingsley, at page 441, the Supreme Court, speaking in the area of dissemination of pornography, said:

> 'It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. (underscoring ours.) Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice.'

"Mugler v. Kansas, 123 U.S. 623 (1887) involved Kansas' first prohibition laws and, among others, a section providing, 'All places where intoxicating liquors are . . .sold. . . .are declared to be common nuisances and upon the judgment of any court . . . .finding such place to be a nuisance under this section, the sheriff . . . shall be directed to shut up and abate such place. . . .' The place involved had been the subject of liquor sales. The Court, in upholding the constitutionality,

said:

> 'The State, having authority to prohibit the. . .sale of intoxicating liquors. . .we do not doubt her power to declare any place kept and maintained for the illegal manufacture and sale of such, shall be deemed a common nuisance and to be abated, and, at the same time, to provide for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes. . . . The statute does not put the brand of a common nuisance upon any place, unless that place is kept and maintained for purposes declared by the legislature to be injurious to the community.' (underscoring ours.)
>
> "The padlocking provision of the Ohio statute is a time honored remedy involving the place--it is not censorship or prior restraint."

B. The Rationale Employed in People of the State of California ex rel. Hicks v. "Sarong Gals".

In People of the State of California ex rel. Hicks v. "Sarong Gals", supra, the Court

of Appeal, Fourth Appellate District, was construing an application of the California Red Light Abatement Statute. There, the trial court permanently injoined certain parties from "maintaining, using or occupying the premises known as "Sarong Gals" for the purpose of "lewdness" and had closed the premises to all use for one year. In affirming the permanent injunction, the Court of Appeal analyzed the "padlock" provision as follows:

> "Appellants finally contend that the abatement order is overbroad and impinges upon their First Amendment right to present nonlewd dancing exhibitions at the Sarong Gals. Of course, just as a court order for the incarceration of a convicted lawbreaker impinges on all sorts of constitutional rights, so does the abatement order. The order shutting down the property except for limited uses is specifically authorized, however, by Penal Code, section 11230 which permits the 'closing of the (offending) building. . .against its use for any purpose. . .for a period of one year,. . . .' The question is, therefore, not whether the order impinges on constitutionally guaranteed rights, but whether the statute constitutes a permissible exercise of the

state's police power. (Cf. Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal.2d 515, 530.)

"The purpose of Red Light Abatement proceedings is to abate a nuisance. Abatement of nuisances is a long established and well recognized exercise of the state's police power. (Board of Supervisors v. Simpson, 36 Cal.2d 671, 675; People v. Casa Co., 33 Cal.App. 194; People v. Barbiere, 33 Cal.App. 770, 775-776.) The provision in Penal Code, section 11230 authorizing closing of the offending property to all uses for a period of one year, while harsh, is constitutionally permissible. The Legislature could, and presumably did, consider the alternative of constant police surveillance of the offending premises too burdensome to the community. It is to be remembered that Red Light Abatement proceedings are directed against the offending property itself. Their purpose, it has been said, 'is to effect a reformation in the property itself.' (People v. Bayside Land Co., supra, 48 Cal.App. at p. 261.) Thus, while appellants are arguable denied their right of First Amendment expression to some extent, they are denied such right only upon the

> specific property here involved and only for a limited period of time. They are in the meantime free to exercise their First Amendment rights at any other place. Moreover, appellants' restricted First Amendment rights are penumbral at best. The right to present non-lewd dancing for commercial purposes in a beer bar is hardly to be equated with the right to hold a town hall meeting (See Crownover v. Musick, supra, 9 Cal.3d at page 424-426.) Thus, the interference with appellants' right to free expression is limited and easily overbalanced by the state's substantial interest in abating public nuisances.

The rationale of the Alabama Supreme Court stands in marked contrast to that employed by the Ohio Supreme Court in interpreting the Ohio Red Light Abatement Statute. See, also, Michigan ex rel. Cahalan v. Diversified Theatrical Corp., 229 N.W.2d 389 at 395 (Mar. 4, 1975). In Ohio, where the statutory language defining "nuisance" in the Ohio Red Light Abatement Statute specifically encompasses a place where obscene films are exhibited, the operation of the statute, in general, is quite simple. Its constitutionality as applied to one motion picture film ("I Am Curious Yellow") was challenged in the federal

system and upheld by a three-judge court in Grove Press, Inc. v. Flask, 326 F. Supp 574 (Mar. 10, 1970) (Celebrezze, Green, Batiste). See Grove Press Inc. v. Flask, 413 U.S. 902, 37 L.Ed.2d 1013, 93 S. Ct. 3026 (June 25, 1973) vacated and remanded for further reconsideration in light of Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 207 (June 21, 1973.) In State of Ohio ex rel. Ewing v. "Without a Stitch", 37 Ohio St.2d 95, 307 N.E.2d 911 (Feb. 27, 1974) the Ohio Supreme Court also upheld its constitutionality. There the State Court discussed, at great length, the operation of the Statute as a whole, as applied to the motion picture film, "Without A Stitch" and concluded at page 917:

> "It is interesting to note that six of those reasons were also raised and rejected by the Federal District Court in Grove Press v. Flask, supra, (326 F.Supp. 574).
>
> "This court holds that R.C. 3767.01 et seq. prescribe a constitutionally permissible method of controlling the exhibition of obscene films."

The Ohio Supreme Court in applying the "padlock" provision in State of Ohio ex rel. Ewing v. "Without A Stitch", 37 Ohio St.2d 95, 307 N.E.2d. 911, 917 (Feb. 24, 1974) surmounted the

obstacle envisioned by the Alabama Supreme Court by simply holding the obvious--that the release provisions do not require the owner to show that no film to be exhibited during the one-year period will be obscene---the operator is simply required to demonstrate that the nuisance, in what ever form, has been abated. On appeal, this Court dismissed the appeal for want of a substantial federal question. See Art Theater Guild, Inc. v. Ohio ex rel. Ewing, ___ U.S. ___, 44 L.Ed.2d 82, ___ S.Ct. ___ (April 21, 1975).

Under the Ohio and Alabama Statutes, after an adverse decision in the trial court and the preliminary injunction is issued, the losing litigant has an option as operator and "the person owning in control, or in charge of the nuisance so enjoined." He can show "to the satisfaction of the court or judge that the nuisance complained of is abated," in which case, the court is not required to close the place against its use for the "lewdness" which had been found to exist. Under the Statute, the theater cannot be shut down unless the trial judge is convinced from evidence that the public nuisance is continuing and presently exists. If for example, the public nuisance is found to exist solely on the basis of a film, such as "I Am Curious (Yellow)", and such showing is not representative

of the course of conduct normally experienced, then it could not reasonably be said that a public nuisance exists if, at the time of the trial judge's finding and the preliminary injunction, the film is not showing, having been "pulled" by a responsible exhibitor.

By admitting that under the above set of circumstances such a ruling is proper under the statute, it does not follow therefrom that such would be proper in all cases. The clear intent of the statute is otherwise. Where, for example, the proof were, as here, that the operator has exhibited hard-core programs over a long period of time, the trial judge would be warranted in refusing to accept the testimonial evidence offered by such operator as meeting his burden of proof, i.e., "to the satisfaction of the court that the nuisance had been abated." The trial judge could properly conclude that to accept such testimony, under the proof offered, would be to perpetuate a fraud on the court. See People of the State of California ex rel. Hicks v. Sarong Gals, supra, where the Court, in discussing a related problem, noted that once the public nuisance had been established, the burden of presenting evidence that the public nuisance had been abated shifted to the defendant:

"Appellants next contend that the order

of abatement was invalid because the nuisance had been abated. In support of their contention, they argue that no evidence was presented to establish violations of lewd conduct or obscenity statutes after December 15, 1970. The contention is without merit."

"In the first place, evidence was introduced at the trial reporting a performance at the Sarong Gals on or about January 3, 1973, less than two weeks before the trial date, from which the trial court could conclude that the nuisance was continuing."

"In the second place, once the People presented evidence to show that lewd acts had taken place at the Sarong Gals, it was incumbent upon appellants to present evidence showing that the nuisance had been abated. (See People v. Goddard, 47 Cal.App. 730, 734; People v. Macy, 43 Cal.App. 479, 483; People v. Dillman, 37 Cal.App.415, 419-420.) It is a maxim of jurisprudence that '(a) thing continues to exist as long as is usual with things of that nature.' (Civ. Code, 3547).) Appellants' reliance on People v. Goddard, supra, is misplaced. In Goddard, there was clear and uncontra-

dicted evidence to show that the persons occupying the premises for immoral purposes vacated the premises three days before the filing of the complaint. No similar showing was made here."

C. The Error In Logic Of The Alabama Supreme Court's Analysis Of the "Padlock" Provisions of the Alabama Public Nuisance Abatement Statute.

Petitioner herein submits that, analytically, the Alabama Supreme Court's error in logic is the result of faulty deductive reasoning, which proceeded somewhat as follows:

Major Premise: To enjoin the showing of films in the future without a prior adversary hearing on the obscenity of such films is a prior restraint and unconstitutional under Near v. Minnesota, supra.

Minor Premise: The padlock penalty of the Alabama Public Nuisance Act operates to prevent the showing of films in the future without an adversary hearing on the obscenity of those films.

Conclusion: The Alabama Public Nuisance Statute is unconstitutional.

The syllogism formed by the above three propositions is inaccurate for the facts in the minor premise have been used falsely, not having been given in their actual setting of experience,

but abstractly from a larger whole of circumstances. See Legal Reasoning and Briefing, by Brumbaugh, copyright 1917 by the Bobbs-Merrill Co. at page 56:

> "The situation is different if the answer or plea be one in confession and avoidance. Logically considered, the admission or confession is not that the two premises are legally connected, but merely on the face logically correct. They are admitted to be, parts only, of a larger whole of circumstances which the complaint has not adequately set out, and hence is an instance of where legal logic varies from ordinary logic. The latter concerns itself merely with the correct relationship of particulars and rules, but law looks into the actual background of fact. We have seen elsewhere that legal logic defines its own concepts, and prescribes the number, condition, and nature of its facts - now we preceive that it demands also that all of such facts be correctly reported. Certain facts, therefore, in a pleading may be confessed as true, but at the same time not true for the purpose and effect for which they were originally drawn up, that is to say, their legal effect as the Minor

Premise of a legal syllogism is false, because the facts have been used falsely, not having been given in their actual setting of experience, but abstracted from a larger whole of circumstances. Thus, a part removed from the whole of which it is a part no longer appears in its true significance, and it is this falsity of a want of completeness against which an answer Confession and Avoidance is directed.

"The effect of an answer in Confession and Avoidance, from the syllogistic side, is to eliminate the general rule of law as inapplicable to the actual and complete set of facts, and by means of the new matter which is added, completely change the coloring of the Minor Premise, so that it no longer expresses any cause of action against the defendant, or one of a different import and effect. In such manner the whole legal syllogism, as first set up by the complaint, vanishes. However, it does not follow that a trial will be made unnecessary, for the new matter alleged in the answer may in turn be denied, and this issue of fact will then be tried upon its merits. In such case the validity of the primary syllogism is held in abeyance until the latter question

upon which it is now conditioned is determined. If the new matter is relevant and proved true, the whole original cause of action will disappear, or be modified, but if not, then the two premises alleged in the first pleading will become legally effective without further proof.

"In addition to pleadings by way of denial or confession and avoidance there may occur an answer calling for matter especially pleaded by way of estoppel, or otherwise, as for instance the Statute of Limitations, Statute of Frauds, Res Adjudicata, or defenses in suspension or abatement of the writ. What particular relation have these and other similar special pleadings to the syllogistic premises set out in the plaintiff's complaint or declaration? Unquestionably we have here another example of what was pointed out in the first chapter to be a variance of legal logic from ordinary logic. Somewhat in the nature of an avoidance without a confession, it does not deny the truth and validity of the rule of law to the case, nor does it question its applicability to the facts as alleged in the Minor Premise, but it does a very unique thing--it invokes

> a wider rule of law within which the rule plead in the first pleading is but a part, just as in Confession and Avoidance, a wider sphere of fact was plead--and thus it challenges the right of the plaintiff to put the special set of facts in issue. Hence, a greater rule of law is plead against a lesser, a more comprehensive syllogism over a lesser - the first plead by alleging the Minor Premise and implying the Major Premise, the second by pleading the Major Premise and implying the Minor Premise." (Our emphasis.)

Applying Brumbaugh's reasoning to the facts at hand, there can be no denying of the fact that the "padlock" will prevent the showing of films at the Fox Cinema in the future--films as to which there has not been no adversary hearing. The legal effect of that admission, however, does not require the conclusion thereafter drawn by the Alabama Supreme Court. The "new matter" which has been pleaded (that is the factual finding that a moral public nuisance has been shown to exist at that address) invokes a wider rule of law; namely, that a forfeiture penalty (loss of lease) may be exacted in connection with an illegal use--within which the original rule pleaded is but a part--and thus

it challenges the right of the respondent to put the special set of facts in issue.

On the above matter, consider the following second syllogism:

Major Premise: Under the ancient doctrine of deodand expressed in U.S. v. U.S. Coin and Currency, supra, and One Lot of Emerald Cut Stones and One Ring v. U.S., supra, where a place is determined in a legal proceedings to be operating as a public nuisance involving contraband, a penalty may be applied forfeiting the leasehold interest in the real property used in conducting such nuisance for a period of up to one year.

Minor Premise: The Alabama Public Nuisance Statute, operates to prevent the showing of films in the future without an adversary hearing on the obscenity of those films through forfeiture of the leasehold (use of the premises) as a penalty.

Conclusion: The Alabama Public Nuisance Statute is constitutional.

Instead of according the state lawsuit its historical treatment as one which involved the status of real property and a determination of whether or not the "res" constituted a public nuisance as to which certain statutory penalties could be applied, namely the forfeiture of the leasehold interest in such property (a legal

equivalent of "loss of use for a year") and the forfeiture of the personal property used therein - an approach which presented absolutely no constitutional questions, see U.S. v. U.S. Coin and Currency, 401 U.S. 715, 23 L.Ed.2d 434, 91 S.Ct. 1041 (Apr. 5, 1971), One Lot of Emerald Cut Stones and One Ring v. U.S., 409 U.S. 232, 34 L.Ed. 2d 438, 92 S.Ct. 489 (Dec. 11, 1972) - the Court erroneously fixed its attention on particular language within the statute which, when viewed by itself, as an in personam restriction against an individual, gave the mistaken appearance of being subject to attack under the Near v. Minnesota, supra, "prior restraint" doctrine.

CONCLUSION

Petitioner submits that the "padlock" provision mandated by the Alabama Legislature in Title 7, section 1101, is not prohibited by the federal constitution, and is entirely within the legislative powers of government and the traditional equity powers of the state courts. Further, the procedural aspect of this case identifies it as an ideal vehicle for resolving

this critical issue of constitutional law. 3/ Petitioner submits that, as a practical matter, the "padlock" penalty provides the only means whereby the Cities may rid themselves of these rapidly-spreading pornographic moral nuisances. Petitioner submits that the mandatory padlock feature of the Red Light Abatement Act provides a type of relief which cannot be expected to flow from a general application of the criminal laws dealing with obscenity (see footnote 1 at

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3. See "Reasons For Granting The Writ" at page 26, supra. The identical issue (but from the more favorable advantage of the federal "padlock" issue having been upheld in the state trial court) was presented to this Court in Lawrence S. Huffman as Prosecuting Attorney for Allen County, Ohio et al. v. Pursue Ltd., No. 73-296 (see page 23-24, supra). The procedural issue in Huffman, supra, and this Court's disposition of that matter did not, however, permit a ruling on the critical "padlock" issue. Huffman et al. v. Pursue, Ltd., ___ U.S. ___, 43 L.Ed.2d 482, ___ S.Ct. ___ (Mar. 18, 1975). The state appellate route, pursued herein, follows the advice of this court in Huffman et al. v. Pursue, Ltd., supra, and MTM, Inc. v. Baxley, ___ U.S. ___43 L.Ed.2d 636, __ (Mar. 25, 1975). It may be noted that the respondent herein, General Corporation, was also a federal plaintiff in a federal case against this petitioner which was consolidated with, and ruled upon by the three-judge federal district court in MTM, Inc. v. Baxley. In the latter case, General Corporation did not join MTM, Inc. in appealing the three-judge court ruling to this court.

pages 3-4 supra.). Used in conjunction with the recordation of a lis pendens, as was done in the cause herein, the certainty, clarity, and mandatory nature of the Red Light Abatement provisions permit law enforcement to justly achieve its objective by:

1. avoiding fraudulent assignments and transfers, and

2. placing the real property owners and assignees on notice as to what their obligations are under the circumstances and what they may justly expect.

Where the porno theater real estate is owned by or can be traced to the operators of the porno theater and their profits, the entire cost of abatement can be levied upon the cause of the nuisance.

The Writ of Certiorari should be granted as prayed for.

Dated: January 16, 1976

Respectfully submitted,

James J. Clancy
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January 1976, copies of the within Petition for Writ of Certiorari were mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

Mr. Frierson M. Graves Jr.
Suite 2020 First National Bank Bldg.
Memphis, Tennessee 38103

Morring, Giles, Watson & Willisson
401 Franklin Street, S.E.
Huntsville, Alabama 35801

James J. Clancy
Attorney for Petitioner

APPENDIX A

Complaint and Application for Temporary and Permanent Injunction to Abate a Nuisance, filed on January 16, 1973 in State of Alabama on the relation of Eugene Sweeton, Chief of Police of the City of Huntsville, Alabama v. General Corporation, a corporation organized and existing under the laws of the State of Alabama; Charles E. Outland: Floyd G. Bradford; Mary Roe; A.B.C. Corporation; X.Y.Z. Corporation; John Doe #1; John Doe #2; John Doe #3; and John Doe #4, Circuit Court in Equity, Case No. 30847

. . . . . A3 - A17

CIRCUIT COURT IN EQUITY
Case No. _____

STATE OF ALABAMA

MADISON COUNTY

STATE OF ALABAMA on the relation of EUGENE SWEETON, Chief of Police of the City of Huntsville, Alabama
PETITIONER

vs.

GENERAL CORPORATION, a corporation organized and existing under the laws of the State of Alabama; CHARLES E. OUTLAND; FLOYD G. BRADFORD; MARY ROE; ABC CORPORATION; XYZ CORPORATION; JOHN DOE #1; JOHN DOE # 2, JOHN DOE # 3; and JOHN DOE # 4
RESPONDENTS

COMPLAINT AND APPLICATION FOR TEMPORARY AND PERMANENT INJUNCTION TO ABATE A NUISANCE

Comes now, The State of Alabama, on the relation of Eugene Sweeton, Chief of Police of the City of Huntsville, Petitioner, and for its cause of action in equity to abate the motion picture theater known as Fox Cinema as a public nuisance in Madison County, Alabama, states:

1. That he is the Chief of Police of the City of Huntsville, Alabama, and is a citizen of Madison County, State of Alabama, over the age of 21 years, and brings this action in equity

in the name of the State of Alabama as authorized by the State Legislature in Chapter 31, Article 2 of Title 7, Code of Alabama, 1940;

2. That the Respondent, General Corporation, is a corporation organized and existing under the laws of the State of Alabama and doing business in Huntsville, Alabama;

3. That said corporation operates a motion picture theater business, for profit, open to and soliciting patrons from the general public, called Fox Cinema, located at 205 East Side Square, Huntsville, Alabama; that said business has been opened for a period of time more than 19 months prior to the filing of this bill.

4. That the Respondent, Mary Roe, whose true name is unknown to Petitioner, but whose name will be added by amendment when ascertained, is a resident of Madison County, Alabama, over the age of 21 years and of sound mind, and is the manager and person in control of the operation of the Fox Cinema Theater;

5. That your Petitioner is informed and believes that the owner of the building in which the Fox Cinema Theater is operated, and the lands upon which same is located, is Kate Milligan Wyatt, whose address is 504 Eustis Avenue, S.E., Huntsville, Alabama, and said property is particularly described as follows, to-wit:

205 East Side Square, S.E., Huntsville, Alabama. That part of Lot 1, Block 33, according to the Quigley Map of the City of Huntsville, Madison County, Alabama, particularly described as being the three story brick building fronting on East Side Square 39' 1" and being 99' 6" deep, being the same premises formerly leased to J.C. Penney Co. by that certain instrument dated 7-20-61, and filed for record 10-5-61 in Deed Book 300 at page 541 in the Office of Probate Recorder, Madison County, Alabama.

6. That your Petitioner is informed and believes, and based upon such information and belief, Petitioner states and charges that the Respondents, Charles E. Outland and Floyd G. Bradford, whose residence addresses are unknown to Petitioner, are president and vice president respectively of Respondent General Corporation, and are stockholders therein and members of the Board of Directors thereof, and as such are now deriving, and have derived in the past, substantial revenues from the exhibitions of various motion picture films shown at Fox Cinema Theater, including those specifically named in this Bill, and that said Respondents are over 21 years of age and of sound mind;

7. That the Respondents, ABC Corporation, XYZ Corporation, John Doe #1, and John Doe #2, whose true names are unknown to Petitioner, but whose names will be added by amendment when

ascertained, own certain distribution rights in various motion picture films heretofore shown at Fox Cinema Theater in the course of said theater business and are now, and have been in the past, deriving substantial revenues from the exhibition of said motion picture films, including those films specifically named herein;

8. That at all times hereinafter mentioned, Respondents,Charles E. Outland, Floyd G. Bradford, and Respondents, John Doe #3 and John Doe #4, whose true names are unknown to Petitioner, but whose true names will be added by amendment when ascertained, and each of them were and now are principals and alter egos of Respondent, General Corporation, a corporation, and are executive officers, directors, or stockholders of said Respondent, and are beneficially interested in the income, profit, and financial success of said corporation, and have dominated, influenced, and controlled the business and affairs of said corporation. There is such a unity of interest and ownership between said Respondents, and each of them, and General Corporation, that the individuality and separateness of said individual Respondents and said corporation has ceased. Adherence to the fiction that the Respondent, General Corporation, a corporation, has separate existence from

Respondents, Charles E. Outland, Floyd G. Bradford, John Doe #3 and John Doe #4, would, under the circumstances, sanction a fraud and promote an injustice.

9. That for a period of time in excess of 19 months, the Respondents, through the Fox Cinema Theater, have consistently shown lewd and obscene motion picture films in the City of Huntsville, County of Madison, which films have violated the laws of the State of Alabama; that such use of the premises described above establishes said premises as a nuisance and as such the same should be abated;

10(a) That the showing to the public at said theater on the play dates December 20, 1972 to December 26, 1972, inclusive, of the motion picture "Making The Blue Movie" and an unnamed second feature was a violation of the obscenity and nuisance laws of the State of Alabama;

10(b) That the showing to the public at said theater on the play dates December 27, 1972 to January 2, 1973, inclusive, of the previews of coming attractions and motion pictures "Gun Runners" and "Mary Jane" was a violation of the obscenity and nuisance laws of the State of Alabama;

10(c) That the showing to the public at said theater on the play dates January 3, 1973

to January 9, 1973, inclusive, of the motion picture films, "Sandra, The Making of a Woman", and "Mary Jane", was a violation of the obscenity and nuisance laws of the State of Alabama;

11. That attached hereto as Appendices 1A, 1B, 2A, 2B, 2C, 3A and 3B, and incorporated herein by reference as though fully set out, are accurate time and motion studies of each of the films named in paragraph 10 hereof, which time and motion studies consist of a chronological series of photographs of each film, timed in their relative order of appearance, which photographs fairly and accurately depict the conduct visually portrayed on the motion picture screen;

12. That on or about the 10th day of January, 1973, the Respondent began showing the motion pictures, "Mermaids", and "Grabbers", at the Fox Cinema Theater, in violation of the obscenity and nuisance laws of the State of Alabama;

13. That the past and continuing exhibition of said motion picture films at the Fox Cinema Theater, all of which are lewd and obscene under the laws of the State of Alabama, did and does constitute a nuisance under the laws of the State of Alabama, in that (1) the dominant theme of said motion picture films, taken as

a whole, appeals to the prurient interest in sex; and (2) said motion picture films are patently offensive because they affront contemporary community standards relating to the description or representation of sexual matters; and (3) said motion picture films are utterly without redeeming social value, which three elements coalesce;

14. That the exhibition of said motion picture films at the Fox Cinema Theater is a violation of Section 2, Acts of Alabama, 1969, page 1254, approved September 10, 1969, and other sections of the Code of Alabama, and said exhibitions cause moral pollution of the community and will cause and result in immediate and irreparable harm and damage to the morals and welfare of the people of the State of Alabama;

15. That the exhibition of the motion picture films hereinabove alleged to have been exhibited by Respondents constitutes a public nuisance at common law and as that term is defined in Section 1091, Code of Alabama, 1940, which reads as follows:

> "Section 1091. DEFINITIONS.-- For the purpose of this article, the terms place, person, nuisance are defined as follows: Place shall include any building, erection, or place or any separate part or portion

thereof or the ground itself; person shall include any individual, corporation, association, partnership, trustee, lessee, agent or assignee; nuisance shall mean any place as above defined in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, and the personal property and contents used in conducting or maintaining any such place for any such purpose."

for the following reasons:

(a) Visual depiction of the private parts of the body in public, or the visual depiction of sex acts in public, whether real or simulated, under the circumstances prevailing in this case, is conduct which is contrary to good morals, public decency, and the long-standing public policy of the people of the State of Alabama as expressed by the State Legislature in enacting Acts of Alabama, 1969, page 1253, approved September 10, 1969, and other sections of the Code of Alabama.

(b) The conduct described in subparagraph (a) above, if performed offstage and in public in three-dimensional form, would constitute violations of the laws of the State of Alabama, regulating public displays of such sexual activity, and reproduction on the motion picture

screen in public in two-dimensional form, in the manner indicated, and under the circumstances prevailing, is contrary to good morals and public decency and constitutes obscenity as a matter of law.

(c) Such conduct is demonstrated by the following visual depictions in the time and motion studies attached hereto as Appendices 1A through 3B:

Appendix 1A -- "Making The Blue Movie", fellatio depicted on page 1; group sex depicted on page 2; intercourse depicted on page 3; intercourse and fellatio depicted on page 4; masturbation depicted on page 5; intercourse depicted on page 6; intercourse, group sex and fellatio depicted on page 7; lesbianism and intercourse depicted on page 8; group sex, fellatio and intercourse depicted on page 9; intercourse and group sex depicted on page 10; intercourse depicted on page 11;

Appendix 1B -- Unnamed second feature, lesbianism and masturbation depicted on page 1; lesbianism depicted on page 2; intercourse depicted on page 4;

Appendix 2A -- Previews, lesbianism depicted on page 1; fellatio and intercourse depicted on page 2;

Appendix 2B -- "Gun Runners", intercourse

(seduction) depicted on page 1; intercourse depicted on page 2 and 3; voyeurism, intercourse, and auto eroticism depicted on page 5; intercourse depicted on page 6;

Appendix 2C -- "Mary Jane", intercourse, cunnilingus and group sex depicted on page 1; intercourse and group sex depicted on page 2; intercourse, fellatio, cunnilingus, lesbianism and group sex depicted on page 3; masturbation, lesbianism, cunnilingus and group sex depicted on page 4; cunnilingus, lesbianism and group sex depicted on page 5; cunnilingus, fellatio, intercourse and group sex depicted on page 6; lesbianism, fellatio, cunnilingus, and intercourse depicted on page 7; lesbianism, fellatio and intercourse depicted on page 8; intercourse depicted on page 9; group sex and intercourse depicted on page 10; group sex, fellatio and intercourse depicted on page 11;

Appendix 3A -- "Mary Jane", fellatio, intercourse, cunnilingus, and group sex depicted on page 1; group sex, and cunnilingus depicted on page 2; cunnilingus, group sex, intercourse, lesbianism, and auto eroticism depicted on page 3; lesbianism depicted on page 4; lesbianism, group sex, and cunnilingus depicted on page 5; cunnilingus, group sex, lesbianism, and intercourse depicted on page 6; fellatio, cunnilingus,

lesbianism, and intercourse depicted on page 7; intercourse, fellatio, lesbianism, and fellatio depicted on page 8; fellatio, intercourse, and lesbianism depicted on page 9; group sex, and lesbianism depicted on page 10; group sex, consisting of cunnilingus, fellatio, and intercourse depicted on page 11; group sex depicted on page 12; grpup sex depicted on page 13;

Appendix 3B -- "Sandra, The Making of a Woman", intercourse depicted on page 1; intercourse and auto eroticism depicted on page 2; auto eroticism and intercourse depicted on page 3; voyeurism, cunnilingus, and fetishism depicted on page 4; lesbianism depicted on page 5; sadomachochistic sex, and intercourse depicted on page 6; intercourse depicted on page 7; intercourse depicted on page 8;

That each and all of the foregoing acts and the conduct of the Respondents in the use of said property for the use and purposes and in the manner aforesaid, interferes with the tranquility, peace, and quiet, generally, of Petitioner and citizens of the City of Huntsville, Alabama, and the nearby communities, and constitutes unlawful, unwarranted, and unreasonable use of Respondent's property to the extreme annoyance, disturbance, discomfort, and hurt of Petitioner, and is detrimental to the public

good and to the common welfare; such lewd acts and conduct are offensive to public decency, morals, peace, and health, and constitute a public nuisance which is subject to abatement under Chapter 31, Title 7, Code of Alabama, 1940, and should be forthwith enjoined and abated; and unless enjoined by the Court, the Respondents, and each of them by themselves, and through their agents or representatives, will continue to exhibit the motion picture films, and other films referred to in paragraph 12 hereof similar to those herein specifically mentioned at the Fox Cinema Theater;

17. That before the commencement of this action, a verified complaint alleging the facts constituting the nuisance was filed in the Office of the Probate Judge of Madison County, together with a notice of the pendency of the action, containing the name of the Court, the names of the parties, the object of the action, and a brief description of the property affected thereby.

WHEREFORE, Petitioner prays:

1. That this Court take jurisdiction over the Bill of Complaint and Petition as herein presented, and that the said General Corporation, a corporation organized and existing under the laws of the State of Alabama; Charles E. Outland,

Floyd G. Bradford, Mary Roe; ABC Corporation; XYZ Corporation; John Doe #1; John Doe #2; John Doe #3; and John Doe #4, be made parties respondent to this cause, and that proper process of this Court will issue to the Respondents named herein requiring them to plead, answer, or demur to this Bill of Complaint within the time allowed by law;

2. That the Court after notice and hearing, issue a preliminary injunction, (a) enjoining and restraining the Respondents pendente lite from maintaining such nuisance, and (b) closing the place known as Fox Cinema against its use by the Respondents as a motion picture theater until final decision shall be rendered on the application for a permanent injunction, and (c) requiring an accounting of the box office receipts arising out of the exhibition of the above-named motion picture films; that at the time and place so fixed, the Respondents be required to appear with the above-named motion picture films and each of them, and show cause, if any they have, at said hearing, why an injunction should not be issued, and why an accounting should not be ordered of all box office receipts arising out of the exhibition of said motion picture films from the first exhibition thereof in the State of Alabama to and including the final performance

after termination of any appeal in favor the the State of Alabama, and the same forfeited to the State of Alabama as contraband upon final determination of any appeal in favor of the State of Alabama;

3. That after final hearing, the Respondents, and all of them, and all persons acting by, through, under or in concert with them be permanently and perpetually enjoined and restrained from exhibiting said motion picture films, and films of like or similar kind or description, and maintaining the nuisance at the place complained of, and that the Respondents be permanently and perpetually enjoined from maintaining such nuisance elsewhere in the county;

4. That Petitioner have judgment for costs of abating said public nuisance, including reasonable attorneys fees, and the reasonable costs of investigating the charges herein made and the preparation of the matters relating to this action, and for such other, further, and different relief to which in equity and good conscience it may be entitled.

Attorneys for the Petitioner

_____

Charles H. Younger

_____

E. Cantey Cooper

Martinson, Manning & Martinson

BY: _____

Glenn F. Manning

A.S. Johnston, III
Schan Building
122 W. Howard Ave.
Biloxi, Miss. 39533
(OF COUNSEL)

STATE OF ALABAMA

MADISON COUNTY

Before me, _____, a Notary Public in and for said County and State, on the _____ day of January, 1973, personally appeared _____, known to me, and being sworn by me, he stated that he has read the above Bill of Complaint, and knows the contents thereof, and that the same are true of his own knowledge, except as to matter which are therein stated to be on his information and belief, and as to those matters he is informed and believes them to be true.

Sworn and subscribed before me this ___ day of _____, 1973.

_____

NOTARY PUBLIC

APPENDIX B

Final Decree of Circuit Judge John D. Snodgrass, filed on February 23, 1973 in State of Alabama on the relation of Eugene Sweeton, Chief of Police of the City of Huntsville, Alabama v. General Corporation; Charles E. Outland; Floyd G. Bradford, In the Circuit Court In Equity, Case No. 30847

. . . . . B3 - B5

B-3

IN THE CIRCUIT COURT, IN EQUITY
CASE NO. 30847

STATE OF ALABAMA
COUNTY OF MADISON

STATE OF ALABAMA on the relation of EUGENE SWEETON, Chief of Police of the City of Huntsville, Alabama

PETITIONER

vs.

GENERAL CORPORATION, CHARLES E. OUTLAND, FLOYD G. BRADFORD

RESPONDENTS

FINAL DECREE

This cause being submitted for final decree on the Pre-Trial Orders of February 13 and February 22, 1973, the pleadings, stipulations and the evidence, the Court finds as follows:

1. The respondent, General Corporation, an Alabama corporation operated the "Fox Cinema" at 205 East Side Square, Huntsville, Alabama. That the respondent, Jean Phillips, is the manager of said theater.

2. The evidence shows the respondents have shown obscene movies as defined by Title 14 § 374(16j) et.seq., Code of Alabama 1940 (Recomp. 1958), by Roth v. U.S. 354 U.S. 476, 1 L Ed. 2d 1498, 77 S. Ct. 1304 or by any other standard

that this Court is aware. "Obscene" means lewd, Title 14 § 374 (3) Code of Alabama 1940 (Recomp. 1958). "Lewd" means "obscene" Black's Law Dictionary 4th Ed. p. 1052.

3. Title 7 § 1091 Code of Alabama 1940 (Recomp. 1958) provides that a place where lewdness is conducted, permitted, continued or exists shall constitute a nuisance.

4. The Court finds the respondents have operated their theater so as to constitute a public nuisance under the laws of this State. No intent was shown by the respondents to operate their place of business other than as a public nuisance nor that they had ever operated said theaters in any other manner.

5. That the respondents contentions as outlined in the Pre-Trial Order of February 13, 1973 are not sufficient to deny the relief sought by the petitioner.

It is therefore CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court:

1. That the respondents are perpetually enjoined from maintaining a nuisance at 205 East Side Square, Huntsville, Alabama or elsewhere in the county.

2. That all personal property and contents used in conducting the nuisance shall be removed from 205 East Side Square, Huntsville, Alabama,

and this personal property shall be sold in the manner provided for the sale of chattels under execution.

3. That the theater, Fox Cinema, located at 205 East Side Square, Huntsville, Alabama shall be closed for any purpose for the period of one year unless sooner released pursuant to Title 7 § 1104 Code of Alabama 1940 (Recomp. 1958).

4. That the proceeds of the sale of the personal property shall be applied in payment of costs of action and abatement and petitioner's costs.

5. Petitioner is denied attorney's fees and the accounting.

This the 23rd day of February, 1973.

/s/
JOHN D. SNODGRASS
Circuit Judge

FED THROUGH

APPENDIX C

Amendment to Final Decree of Circuit Judge John D. Snodgrass, filed on March 23, 1973 in State of Alabama, on the relation of Eugene Sweeton, Chief of Police of the City of Huntsville, Alabama v. General Corporation, a Corporation Organized and Existing Under the Laws of the State of Alabama, et al., In the Circuit Court, In Equity, Case No. 30847

. . . . . C3 - C7

C-3

IN THE CIRCUIT COURT, IN EQUITY
CASE NO. 30847

STATE OF ALABAMA
MADISON COUNTY

STATE OF ALABAMA, ON THE RELATION
OF EUGENE SWEETON, CHIEF OF POLICE
OF THE CITY OF HUNTSVILLE, ALABAMA

PETITIONER

vs.

GENERAL CORPORATION, A CORPORATION
ORGANIZED AND EXISTING UNDER THE
LAWS OF THE STATE OF ALABAMA; ET ALS

RESPONDENTS

AMENDMENT TO DECREE

This Court having entered a decree on the 23rd day of February, 1973, in the above-styled cause, permanently enjoining the Respondents General Corporation and Jean Phillips from maintaining a nuisance at 205 East Side Square, Huntsville, Alabama, or elsewhere in Madison County, Alabama, and granting the Petitioner other relief, and the Court on the motion of the complainants being of the opinion that its said decree should be more definitive, and should more clearly and precisely reflect the intent of the Court in

rendering said decree, it is hereby

ORDERED, ADJUDGED AND DECREED by the Court that said decree made and entered in this cause on the 23rd day of February, 1973, be, and the same hereby is, amended by deleting all words and figures from said decree which immediately follow the words "It is therefore CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court:", and by substituting, in lieu of said deleted portion of said decree, the following

"1. That the Respondent General Corporation, a corporation organized and existing under the laws of the State of Alabama, and the Respondent Jean Phillips, and any and all persons, be, and they are hereby, perpetually enjoined from continuing to maintain a "nuisance", as defined by Sections 1091 and 1092 of Title 7 of the Code of Alabama 1940, on those premises located at 205 East Side Square, Huntsville, Alabama, known as the "Fox Cinema", and which are more particularly described in the paragraph numbered 5 of the original Bill of Complaint in this cause, which description is incorporated into this decree, and made a part hereof by reference, and the Respondent General Corporation and the Respondent Jean Phillips are perpetually enjoined and restrained

from maintaining such a nuisance elsewhere in Madison County, Alabama.

2. That, notwithstanding the provisions of the immediately preceding paragraph of this decree, said Respondents are not enjoined and restrained from operating a motion picture theatre, or engaging in any other form or kind of speech or expression which is not "obscene" as the word "obscene" is presently, or shall hereafter be, defined by a controlling decision of the Supreme Court of the United Stated, or by the Supreme Court of Alabama, whichever definition shall be less restrictive, and this decree shall not be construed to prohibit any conduct which is protected by the Constitution of the United States, the Constitution of Alabama, Acts of Congress of the United States, or Acts of the Legislature of Alabama, and the said Respondents are enjoined only from using, occupying, establishing, or conducting a building, erection, or place, or any separate part of portion thereof, or the ground itself, in or upon which "lewdness", in the same sense as "obscenity", is conducted, permitted, continued, or exists.

3. That all personal property and contents situated in or on the hereinbefore described premises, which the Court hereby finds was used in conducting and maintaining such nuisance,

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shall be removed from said premises by the Sheriff of Madison County, Alabama, who shall sell same in the manner provided for the sale of chattels under execution, and the proceeds of the sale of same, or so much of such proceeds as may be necessary shall be applied by the Court in payment of the costs of this action and abatement, including Complainant's costs, and in payment of the fees allowed by law to the Sheriff for removing and selling said personal property and contents, and for closing the place and keeping it closed.

4. That said nuisance shall be, and the same hereby is, abated, and the said theatre building known as "Fox Cinema," and the above-described lands on which same is located, be, and the same hereby are, closed for a period of one year from the 23rd day of February, 1973, and said building and premises are hereby enjoined and restrained against use for any purpose by any person, firm, or corporation for such period of time, unless sooner released.

5. That the Register issue a writ of permanent injunction, directed to said Respondents, enjoining and restraining them as above set out.

6. That Petitioner is denied the accounting and attorneys' fees prayed for in the original Bill.

7. That jurisdiction over this cause is retained for such further orders and decrees as may be necessary or appropriate in the premises."

Done this 23 day of March, 1973.

/s/ John D. Snodgrass
Circuit Judge

APPENDIX D

Opinion of the Supreme Court of Alabama in General Corporation, a corporation v. State of Alabama ex rel. Eugene Sweeton, Chief of Police, City of Huntsville, Alabama, 320 So. 2d 668, filed on September 18, 1975

. . . . . D3 - D19

[5] The evidence in the record does not ow a change in circumstances in this se which would bar the relief requested counterclaimants.

Affirmed.

HEFLIN, C. J., and MERRILL, LOODWORTH, MADDOX, FAULKER, JONES, ALMON and SHORES, JJ., ncur.

GENERAL CORPORATION, a corporation,

v.

STATE of Alabama ex rel. Eugene SWEETON, Chief of Police, City of Huntsville, Alabama.

SC 521.

Supreme Court of Alabama.

Sept. 18, 1975.

State filed a complaint under the Red ight Abatement Act seeking to abate as a uisance adult movie theatre which allegly showed obscene films. The Circuit ourt, Madison County, John D. Snodass, J., entered a judgment ordering there closed for one year, and the operator the theatre appealed. The Supreme ourt, Almon, J., held that the Red Light batement Act was applicable to obscene aterial; that burden of proof in action as upon the State; and that closing, for y purpose for one year, of theatre pursuit to statute authorizing the abatement, as nuisance, of a place where lewdness is nducted was unconstitutional as a prior straint of First Amendment rights.

Reversed and remanded.

Jones, J., concurred in the result.

Maddox, J., concurred specially.

Heflin, C. J., filed an opinion concurng in the result in which Bloodworth and ores, JJ., joined.

1. Constitutional Law ⇐90.1(1)

Patently obscene expression falls outside protection of First Amendment and enjoys no immunity from state regulations. (Per Almon with three Judges concurring four Judges concurring in the result and one Judge concurring specially.) U.S.C.A. Const. Amend. 1.

2. Obscenity ⇐1

Primary requirements of decency may be enforced against obscene publications. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) U.S.C. A.Const. Amend. 1.

3. Constitutional Law ⇐90.1(1)

Due to elevated status ascribed to First Amendment guarantees, procedures adopted by states for dealing with obscene expression are subject to close judicial scrutiny. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) U.S.C.A.Const. Amend. 1.

4. Constitutional Law ⇐90(3)

Line between expression unconditionally guaranteed and that which may be legitimately regulated is finely drawn. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) U.S.C.A. Const. Amend. 1.

5. Constitutional Law ⇐90.1(6)

Although motion pictures are a form of expression and within the shield of First Amendment, they are not necessarily subject to the same rules governing other modes of expression. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) U.S.C.A.Const. Amend. 1.

6. Constitutional Law ⇐90.1(6)

Because of the singularly unique nature of the medium, a motion picture may

be denominated obscene and thereby exceed protective bounds of First Amendment long before written description of same subject matter. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) U.S.C.A.Const. Amend. 1.

7. Nuisance ⇐61

Although regulation of obscene expression is unquestionably a legitimate matter for state control, it does not necessarily follow that doctrine of public nuisance can be constitutionally applied to obscenity. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) U.S.C.A.Const. Amend. 1.

8. Nuisance ⇐61

Continuing activity contrary to public morals or decency constitutes public nuisances. (Per Almon with three Judges, concurring, four Judges concurring in the result and one Judge concurring specially.)

9. Nuisance ⇐80

Under the police power, court of equity with proper legislative authorization can assume jurisdiction to abate a nuisance notwithstanding the fact that maintenance of nuisance may also be a violation of criminal law. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.)

10. Constitutional Law ⇐90.1(1)

Three requirements imposed by First Amendment upon any statute which attempts to regulate obscene material: (1) burden of proving obscenity always rests with the State; (2) administrative action determining matter to be obscene must not have air of finality—there must be provision for prompt judicial review; (3) where prior restraint exists, there must be an immediate final determination on issue of obscenity. (Per Almon with three Judges concurring, four Judges concurrin in the result and one Judge concurring spe cially.) U.S.C.A.Const. Amend. 1.

11. Constitutional Law ⇐90.1(1)

Nuisance ⇐61

There is a dichotomy in social ill against which obscenity law and publi nuisance law are directed; definitional tes for obscenity attempts to separate materi als protected by guarantees of freedom o expression; aim of a nuisance action i not the suppression of a particular form o expression, rather the abatement of a con dition which works harm upon a substan tial number of public or which injuriously affects public safety, health, or morals (Per Almon with three Judges concurring four Judges concurring in the result and one Judge concurring specially.)

12. Obscenity ⇐2

Three-prong test for "hard-core pornography" embodied in statute defining obscenity is more stringent than subsequent doctrine announced in Miller decision in which United States Supreme Court set forth demands for determining whether work depicting sexual conduct is obscene. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) Code of Ala., Tit. 14, § 374(16j)

13. Nuisance ⇐61

Red Light Abatement Act authorizing the abatement, as a nuisance, of a place where lewdness is conducted, permitted, continued or exists is applicable to obscene material. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) Code of Ala., Tit. 7, § 1091.

14. Nuisance ⇐61

Under the common law, acts contrary to public morals were considered as public nuisances and subject to abatement as such. (Per Almon with three Judges con-

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curring, four Judges concurring in the result and one Judge concurring specially.)

15. Nuisance ⇐84

Burden of proof in action under Red Light Abatement Act falls upon the State. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) Code of Ala., Tit. 7, § 1091.

16. Nuisance ⇐60

Although Red Light Abatement Act does provide for issuance of temporary injunction after filing of original complaint, in that a hearing thereon must be had within 10 days, Act meets constitutional requirement of providing prompt judicial review of administrative or executive suppression. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) Code of Ala., Tit. 7, §§ 1095, 1096.

17. Nuisance ⇐60

Preadjudicatory restraint imposed by Red Light Abatement Act in the form of temporary injunction of nuisance is saved by other mandatory provisions in Act insuring speedy final resolution of ultimate issue of obscenity. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) Code of Ala., Tit. 7, §§ 1095, 1101, 1103.

18. Constitutional Law ⇐90.1(1)

Any system for regulation of obscene expression involving prior restraint comes to court bearing heavy presumption against its validity. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.)

19. Constitutional Law ⇐90.1(1)

Evidence of obscene conduct in the past does not justify enjoining future conduct which is protected by the First Amendment. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) U.S.C.A.Const. Amend. 1.

20. Constitutional Law ⇐90.1(6)

Closing, for any purpose for one year, of adult movie theatre which allegedly showed obscene motion pictures pursuant to statute authorizing the abatement, as a nuisance, of a place where lewdness is conducted or exists was unconstitutional as prior restraint of First Amendment guarantees. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) Code of Ala., Tit. 7, § 1091; U.S.C.A. Const. Amend. 1.

21. Nuisance ⇐60

Provision in Red Light Abatement Act allowing release on bond if there is no knowledge of existence of nuisance is not curative of constitutional defect arising from unconstitutional application of Act resulting from the prior restraint of allegedly obscene expression. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) Code of Ala., Tit. 7, § 1104.

22. Obscenity ⇐5

Motion pictures which depicted, inter alia, sexual intercourse, fellatio, group sex, lesbianism, fettishism, and sadomasochistic sexual activities were obscene. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.)

23. Constitutional Law ⇐90.1(1)

Even if one is guilty of maintaining an obscenity nuisance, it is not constitutionally permissible to deprive him prospectively of his First Amendment rights. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) U.S.C. A.Const. Amend. 1.

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24. Constitutional Law ⇐90(3)

Doctrine of nuisance cannot serve as means of circumventing First Amendment safeguards. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) U.S.C.A.Const. Amend. 1.

25. Constitutional Law ⇐90(3)

Requirements of First Amendment are stringent and demanding and any regulatory scheme impinging upon such rights is assured of close scrutiny. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) U.S.C.A.Const. Amend. 1.

Frierson M. Graves, Jr., Memphis, Tenn., for appellant.

Watts, Salmon, Roberts, Manning & Noojin, Huntsville, for appellee.

ALMON, Justice.*

The question presented by this appeal is whether the Alabama Red Light Abatement Act, Tit. 7, § 1091 et seq., Code of Alabama 1940, Recompiled 1958, can be constitutionally applied to the exhibition of obscene motion pictures. More specifically, whether the showing of obscene motion pictures constitutes a public nuisance, the sanction for which is the padlocking of the premises for up to one year.

The complaint filed January 16, 1973, alleged that for a period in excess of nineteen months, appellant had consistently shown obscene films at the Fox Cinema Theatre and that the showing of certain of these films constituted a violation of both the nuisance and obscenity laws of the State of Alabama. The complaint prayed for issuance of a preliminary injunction after notice and hearing, and that after a final hearing on the issue of obscenity, appellant, General Corporation, be perpetually enjoined from maintaining said nuisance.

The pretrial order, issued on February 13, 1973, set out the contentions of the respective parties including a stipulation that the Fox Cinema Theatre was an exclosed adult movie house. A supplemental pretrial order was issued on February 22, 1973, stipulating that the issues in controversy were, whether the conduct of appellant constituted "lewdness" under Tit. 7, § 1091, Code, supra.

On February 23, 1973, the final decree of the trial court was entered. Specifically, the trial judge found that appellant had engaged in showing obscene movies at the Fox Cinema Theatre and that such activity constituted a public nuisance. Pursuant to that finding, the court decreed that appellant be perpetually enjoined from maintaining said nuisance at the Fox Cinema Theatre or elsewhere in the county; that all personal property contained in the theatre be removed and sold in the manner provided for the sale of chattels under execution; that the theatre be closed for all purposes for one year unless sooner released under the provisions of Tit. 7, § 1104, Code, supra; and that the proceeds of the sale be applied to the costs. A writ of injunction was issued embodying the terms of the final decree.

On March 23, 1973, the court amended its final decree specifically limiting its operation to obscene matter, but leaving undisturbed the provision closing the theatre for one year.

The evidence showed that appellant was engaged in the operation for profit of the Fox Cinema Theatre, situated in Huntsville, Alabama. During the period of December 20, 1972, through January 10, 1973, inclusive, Mr. Ron Curlee, a detective employed by the Huntsville Police Depart-

* This case was originally assigned to a justice formerly on this court. It has been reassigned to the writer who has listened to the tape recordings of the oral argument.

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ment, visited the Fox Cinema Theatre on several occasions. During these visits Mr. Curlee took numerous sequential photographs and recorded contemporaneous audio tapes of the films which were being exhibited at the theatre. These motion picture films were entitled: "The Making of the Blue Movie," "I am Sandra," "Mary Jane," "The Gun Runners," "The Executive Wives," and "The Mermaids." At trial Mr. Curlee, referring to the notes and pictures he had taken while at the theatre, testified as to the subject matter content of each of the foregoing films. That testimony tended to show that said films depicted, *inter alia*, sexual intercourse, fellatio, cunnilingus, group sex, lesbianism, auto-eroticism, fettishism, voyeurism, and sado masochistic sexual activities.

The State's contention below was that the movies exhibited at the Fox constituted a public nuisance in that they were "obscene," and that under the provisions of Tit. 7, § 1091, et seq. (the Alabama Red Light Abatement Act) the operation of the theatre was subject to abatement. Appellant's position was that this Act was not intended to apply to motion picture films or, in the alternative, if the legislature did so intend, such application is unconstitutional.

[1, 2] Any doubts that patently obscene expression falls outside the protection of the First Amendment and therefore enjoys no immunity from state regulations have long been laid to rest. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); *United States v. Reidel*, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971); *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). "The primary requirements of decency may be enforced against obscene publications." *Near v. State of Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). More recently the United States Supreme Court has reaffirmed the principle that the states have a legitimate interest in regulating the use of obscene material; and, more specifically, that local regulations dealing with such material will not be disturbed or struck down so long as they comport with specific constitutional mandates. *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973).

[3, 4] However, due to the elevated status ascribed to First Amendment guarantees, procedures adopted by states for dealing with obscene expression have been the subject of close judicial scrutiny. *Marcus v. Property Search Warrant*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961). The line between expression unconditionally guaranteed and that which may be legitimately regulated is finely drawn. *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958).

[5, 6] Although motion pictures are a form of expression and within the shield of the First Amendment, *United States v. A Motion Picture Film*, 404 F.2d 196 (2d Cir. 1968), they are not necessarily subject to the same rules governing other modes of expression. *Burstyn v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1951). Because of the singularly unique nature of the medium, a motion picture may be denominated obscene and thereby exceed the protective bounds of the First Amendment long before a written description of the same subject matter. *Landau v. Fording*, 245 Cal.App.2d 820, 54 Cal.Rptr. 177, aff'd 388 U.S. 456, 87 S.Ct. 2109, 18 L.Ed.2d 1317 (1966); *People v. Bloss*, 18 Mich. App. 410, 171 N.W.2d 455 (1969). Moreover, the United States Supreme Court has expressly rejected constitutional immunity from state regulation for obscene films simply because their exhibition is limited to consenting adults. *Paris Adult Theatre v. Slaton*, supra.

[7-9] So, although the regulation of obscene expression is unquestionably a legitimate matter for state control, it does not necessarily follow that the doctrine of public nuisance can be constitutionally applied to obscenity. Traditionally, continu-

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ing activity contrary to public morals or decency have constituted public nuisances. *Price v. State*, 96 Ala. 1, 11 So. 128 (1891); *Ridge v. State*, 206 Ala. 349, 89 So. 742 (1921); *Hayden v. Tucker*, 37 Mo. 214 (1866); *Federal Amusement Co. v. State, ex rel. Tuppen*, 159 Fla. 495, 32 So. 2d 1 (1947); *Abbott v. State*, 163 Tenn. 384, 43 S.W.2d 211 (1931); Perkins on Criminal Law, p. 395 (Foundation Press, 1969); Wood, Law of Nuisances, § 68, p. 87, vol. 1 (3d ed., 1893); 66 C.J.S. Nuisance § 18 d, p. 766. Under the police power, a court of equity with proper legislative authorization can assume jurisdiction to abate a nuisance notwithstanding the fact that the maintenance of that nuisance may also be a violation of the criminal law. *Ridge v. State*, supra; *Evans Theatre Corporation v. Slaton*, 227 Ga. 377, 180 S.E.2d 712 (1971), cert. denied 404 U.S. 950, 92 S.Ct. 281, 30 L.Ed.2d 267 (1971).

However, where First Amendment rights are involved, there was been no such unanimity of authority for a multitude of reasons, the more salient of which warrant separate consideration.

[10] At the outset we note three requirements imposed by the First Amendment upon *any* statute which attempts to regulate obscene material: (1) the burden of proving obscenity must always rest with the State; (2) administrative action determining matter to be obscene must not have an air of finality—there must be provision for prompt judicial review; (3) where prior restraint exists, there must be an immediate final determination on the issue of obscenity. *Blount v. Rizzi*, 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971); *United Artists Corporation v. Wright*, 368 F. Supp. 1034 (N.D.Ala.1974); *Gulf States Theatres of Louisiana v. Richardson*, 287 So.2d 480 (La.Sup.Ct.1974); *New Riviera Arts Theatre v. State*, 412 S.W.2d 890 (Tenn.Sup.Ct.1967).

[11] In terms of burden of proof, traditional public nuisance doctrine vis-a-vis obscenity poses a twofold dilemma; (1) what is the burden of proof, and (2) upon whom does the burden fall. Regarding the former, there is a dichotomy in the social ills against which obscenity law and public nuisance law are directed. The definitional test for obscenity attempts to separate those materials protected by the guaranties of freedom of expression; the aim of a nuisance action, on the other hand, is not the suppression of a particular form of expression, rather the abatement of a condition which works harm upon a substantial number of the public or which injuriously affects public safety, health, or morals. *City of Selma v. Jones*, 202 Ala. 82, 79 So. 476 (1918).

In *Grove Press, Inc. v. City of Philadelphia*, 418 F.2d 82 (3d Cir. 1969) it was held that nuisance doctrine was too elastic and amorphous to constitutionally restrict First Amendment rights. The court concluded that public nuisance doctrine could not be used both to define the standards of protected speech and to serve as a vehicle for its restraint. Accord, *State ex rel. Murphy v. Morley*, 63 N.M. 267, 317 P.2d 317 (1957); *Commonwealth v. Guild Theatre, Inc.*, 432 Pa. 378, 248 A.2d 45 (1968).

Tit. 7, § 1091, Code, supra, defines as a nuisance any place where ". . . *lewdness*, assignation, or prostitution is conducted, permitted, continued, or exists; . . ." (Emphasis ours). By contrast, this language is discernibly "amorphous" when compared with Tit. 14, § 374(16j) (1971 Supp.) which defines obscenity and related terms with specificity and incorporates the three-prong test for "hard-core pornography" of *Roth v. United States*, supra. The final decree of the trial court, however, demonstrates that in finding the films "obscene", the trial judge used the Roth Standard incorporated in the above statute.

[12] Since the final decree in this cause, the U. S. Supreme Court decided *Miller*, supra. We consider under the

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cts of this case that the *Roth* test embodd in our statute was more stringent than e subsequent *Miller* doctrine. Therefore, ppellant can hardly complain that the *iller* standards have worked to its detrient. Moreover, we are here dealing with civil remedial statute with ample due rocess safeguards and since we are in the vil realm we need not be quite so conious of the strictures attendant in crimial prosecution. We believe that the reaning in *Pierce v. State*, 292 Ala. 473, 296 o.2d 218 (1974), applies with equal force ere; specifically, that definitional infirmies in the Alabama Red Light Abatement ct were cured by judicial construction. ccord, *State ex rel. Ewing v. "Without a itch"*, 37 Ohio St.2d 95, 307 N.E.2d 911 1974); *Gordon v. Christenson*, 317 F. upp. 146 (D.Utah 1970); *Grove Press nc. v. Evans*, 306 F.Supp. 1084 (E.D.Va. 969).

Appellant argues in the alternative hat notwithstanding curative judicial conruction, the legislature did not intend the labama Red Light Abatement Act to be pplicable. There is a substantial amount f persuasive authority for this proposition rom judicial interpretation in sister states f their respective Red Light Abatement cts strikingly comparable to our own. In *eople v. Goldman*, 7 Ill.App.3d 253, 287 .E.2d 177 (1972), it was held that, as sed in its statute, "lewdness" was a synnym for prostitution and therefore the ct did not apply to the activity there ought to be enjoined (a "pornoshop"). imilarly, in *Gulf States Theatres of Louiiana v. Richardson*, supra, the Louisiana upreme Court reasoned that its public uisance statute passed in 1918, only one ear prior to our own, was originally deigned to control prostitution and gambling nd therefore could not be used in the irst Amendment area. The court also mphasized the fact that the statute conained virtually no standards for making udicial determinations of obscenity. Accord, *Southland Theatre, Inc. v. State ex el. Tucker*, 495 S.W.2d 148 (Ark.Sup.Ct. 1973); *Harmer v. Tonlyn Productions, Inc.*, 23 Cal.App.3d 941, 100 Cal.Rptr. 576 (1972).

[13, 14] However, from the broad language of Tit. 7, § 1091, Code, supra, there is no indication of any legislative intent to either include or exclude its application to obscene material. Controlling here is the fact that the Alabama Red Light Abatement Act has been construed as being merely declaratory of the common law, *Duncan v. City of Tuscaloosa*, 257 Ala. 574, 60 So.2d 438 (1952), and, as previously noted, acts at common law contrary to public morals were considered as public nuisances and subject to abatement as such.

[15] The second aspect regarding burden of proof—which party upon whom the burden falls—is resolved in favor of the State. The Alabama Red Light Abatement Act contains none of the burden shifting evils present in *Near v. State of Minnesota*, supra, or *Freedman v. State of Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). The transcript clearly shows that the prosecution was called upon and did in fact meet its burden of proof. Neither the Alabama Red Light Abatement Act nor the Alabama Law on Obscenity authorizes any pre-exhibition licensing or permit procedure. The transcript reveals that appellant was not restrained from exhibiting the allegedly obscene films until after a final adversary proceeding on the issue.

[16] The next requirement—prompt judicial review of any administrative or executive suppression—is also due to be resolved in favor of the State. As noted, the Act does not allow nor was there in fact any suppression of appellant's activities until after final adjudication on the issue of obscenity. Although the Act does make provision for issuance of a temporary injunction after the filing of the original complaint, Tit. 7, § 1095, Code, supra, a hearing thereon must be had within ten

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days, *ibid.* The provision for an ex parte restraining order, Tit. 7, § 1096, is expressly limited to "the moving or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist . . . ." and imposes no restraint upon continuing exhibitions of films until trial on the merits.

Although not at issue here, the application of Tit. 7, § 1101, providing for the closing of the premises pending final determination, presents a more troublesome problem which could constitute a pre-adjudicatory suppression of exhibition.

In *Teitel Film Corporation v. Cusack*, 390 U.S. 139, 88 S.Ct. 754, 19 L.Ed.2d 966 (1968), the United States Supreme Court struck down for want of prompt judicial review a city licensing ordinance which provided a 50 to 57 day administrative process before judicial review could be had. The *Teitel* decision, however, dealt with situations where administrative procedures in effect stayed the hand of the judiciary thereby preventing its prompt intervention, supervision, and final determination on the issue of obscenity. See also *Jodbar Cinema, Ltd. v. Sedita*, 309 F.Supp. 868 (W.D.N.Y.1970); *Freedman v. State of Maryland*, supra.

[17] Under the Alabama Red Light Abatement Act, however, pre-adjudicatory restraint in the form of a temporary injunction is saved by other mandatory provisions in the Act which insure a speedy final resolution of the ultimate issue of obscenity. Tit. 7, § 1095, requires a hearing on that issue within ten days of the issuance of the temporary injunction; Tit. 7, § 1101, requires that the defendant must be given at least five days notice prior to the hearing on the matter of whether such an injunction will be granted; and Tit. 7, § 1103, requires that final adjudication shall take "precedence over all other cases except injunctions." Furthermore, the United States Supreme Court has held that the right to a speedy determination arises only where one has been ex parte deprived of a right. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971); *Blount v. Rizzi*, supra. See also *Society to Oppose Pornography, Inc. v. Thevis*, 255 So.2d 876 (La. App.1972).

[18–20] Turning to the last procedural requirement—constitutional prohibition against prior restraint of allegedly obscene expression without immediate judicial determination, any system for the regulation of obscene expression involving prior restraints comes to the court bearing a heavy presumption against its validity. *Bantam Books v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). The decree of the trial court included an order closing the Fox Theatre for *any* purpose for one year. This is not a liquor nuisance nor a prostitution nuisance; rather, a movie house charged with showing certain obscene motion pictures. Evidence of obscene conduct in the past does not justify enjoining future conduct which is protected by the First Amendment. *People ex rel. Hicks v. Sarong Gals*, 27 Cal.App.3d 46, 103 Cal.Rptr. 414 (1972). The padlocking of appellant's operation for one year constitutes prior restraint at its worst and is patently unconstitutional.

While the facts in the recent United States Supreme Court decision of *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), are not directly in point, the reasoning therein is particularly appropriate. We quote:

". . . The presumption against prior restraint is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always

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difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable. See *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958)."

We are not the first jurisdiction to hold unconstitutional as prior restraint of First Amendment guaranties the prospective abatement of movie houses as public nuisances. *Society to Oppose Pornography v. Thevis*, supra; *State of Indiana ex rel. Lee v. Mohney Enterprises et al.*, Ind., 289 N.E.2d 519 (1972); *Gulf States Theatres of Louisiana, Inc. v. Richardson*, supra. The Alabama Law on Obscenity, Tit. 14, § 374(1) et seq., provides criminal penalties for conduct such as appellant's—if retributive punishment is sought, those sanctions, not abatement, are the only proper ones authorized by the legislature.

[21] The provision in the Alabama Red Light Abatement Act, Tit. 7, § 1104, supra, allowing for the release on bond is not curative of this constitutional defect. See *Society to Oppose Pornography v. Thevis*, supra. This remedy is available only if the court is satisfied that the owner had no knowledge of the existence of the nuisance.

[22, 23] We are of the opinion there was ample evidence for the trial judge to conclude that the motion pictures in question are obscene. But we also hold that even if one is guilty of maintaining an obscenity nuisance, it is not constitutionally permissible to deprive him prospectively of his First Amendment rights.

Lest there be any confusion as to the extent of our holding that the Alabama Red Light Abatement Act cannot constitutionally be employed to enjoin prospectively the showing of films in enclosed movie theatres to an adult audience, we hasten to delimit this opinion to at least two First Amendment situations in which that statute so applied *might* pass constitutional muster.

The first would be where the impact of the injunction is absolutely devoid of prior restraint or chilling effect upon prospective exercises of expression other than that adjudicated as obscene. More specifically, where there has been a prompt adversary proceeding in which all the requisite constitutional standards for ascertaining the issue of obscenity have been met and the particular film has been found to be obscene; future exhibition of that *particular* film may well constitute a public nuisance and be permanently enjoined as such. See, *Evans Theatre Corporation v. Slaton*, supra; *Cactus Corporation v. State ex rel. Murphy*, 14 Ariz.App. 38, 480 P.2d 375 (1971); *State ex rel. Keating v. Vixen*, 27 Ohio St.2d 278, 272 N.E.2d 137 (1971); contra, *Harmes v. Tonlyn Productions, Inc.*, supra.

The second involves situations where there is a foisting off of patently obscene films, not fit for children to see, in places within their view to include public streets and facilities, residential properties, and private houses. Such activity may also constitute a public nuisance subject to equitable injunction where, of course, attendant constitutional substantive and procedural safeguards are present. See *Bloss v. Paris Township*, 380 Mich. 466, 157 N.W.2d 260 (1968) (drive-in theatres exhibiting films not fit for minors in plain view of public streets and surrounding residences subject to abatement as a public nuisance). But see the recent case of *Erznoznik v. City of Jacksonville*, — U.S. —, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975).

[24, 25] The foregoing possible exceptions should not be construed by prosecuting authorities as a green light for prospective control of particular obscene films or drive-in theatres which broadcast such films. We again point up the imprecise nature of public nuisance doctrine which is ill-equipped to cope with the intricacies of First Amendment guaranties. The law of nuisance cannot become a vehicle for the protection of the sensibilities of the overly

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fastidious; nor can the doctrine of nuisance serve as a means of circumventing these First Amendment safeguards. The requirements of the First Amendment are stringent and demanding—any regulatory scheme which impinges upon these most precious rights will be assured of close scrutiny.

The judgment in this cause is due to be and hereby is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MERRILL, FAULKNER and EMBRY, JJ., concur.

JONES, J., concurs in the result.

MADDOX, J., concurs specially.

HEFLIN, C. J., with whom BLOODWORTH and SHORES, JJ., join, concurs in the result, with opinion.

MADDOX, Justice (concurring specially).

I agree that the injunction issued here which prohibits the showing of *any* film for one year is overbroad, but I cannot agree that the trial judge is powerless to act.

The Fox Cinema Theatre had been used consistently to show films which depicted:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419.

Chief Justice Burger, writing for a majority of the court, in *Miller*, said that the states could regulate illegal conduct such as occurred in this case. One of the regulatory schemes which the Supreme Court, in *Miller*, said was permissible, includes: "applicable state law, as written *or authoritatively construed.*" *Miller* gave this Court the *power* to set the guidelines for regulation of works which depict or describe sexual conduct. It is my opinion, therefore, that a trial judge, using *Miller* standards, could enjoin the operation of a place as a public nuisance if the place had been used for the purpose of showing films which were obscene, under the *Miller* test. In view of the authority granted to this court under *Miller*, I do not think that this Court is so judicially weak, or should be so timid, that it cannot, or will not, "authoritatively construe" our redlight abatement law in such a manner that trial courts could regulate conduct which *Miller* specifically authorizes states to regulate.

Mr. Chief Justice Burger recognized in *Miller* that courts would not have an easy road, free from difficulty. He said:

"* * * But no amount of 'fatigue' should lead us to adopt a convenient 'institutional' rationale—an absolutist, 'anything goes' view of the First Amendment—because it will lighten our burdens. 'Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees.' *Jacobellis v. Ohio*, supra, 378 U.S. at 187–188, 84 S.Ct. [1676] at 1678 [12 L.Ed.2d 793] (opinion of Brennan, J.). Nor should we remedy 'tension between state and federal courts' by arbitrarily depriving the States of a power reserved to them under the Constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day. See *Roth v. United States*, supra, 354 U.S. at 482–485, 77 S.Ct. [1304], at 1307–1309 [1 L.Ed.2d 1498]. 'Our duty admits of no "substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case." [Citations omitted.]'"

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This Court is the highest court of this state. It is the highest court which can "authoritatively construe" our state laws. I think an examination of the *Miller* opinion clearly indicates that the Supreme Court of the United States intended state courts to construe their state statutes so as to incorporate the specifically prohibited conduct given as examples in the *Miller* case. I think that it is important that we keep in mind that the prohibited acts need not be specifically *written* in any applicable state law, but rather, a judicial construction may be obtained to authoritatively construe any statute so as to incorporate specifically prohibited acts.

It seems clear to me that state courts have the authority to authoritatively construe state statutes and that this is made imminently clear by an analysis of the *Miller* opinion. *Miller* was "vacated and remanded for further proceedings" rather than being outright reversed. I believe that if the Supreme Court was of the opinion that the California statute under consideration in *Miller* could not be authoritatively construed so as to incorporate the new guidelines, the *Miller* case would have been reversed outright rather than being remanded for further proceedings.

The key to the Supreme Court's reasoning in this regard seems to be contained in footnote 7 of the case of *United States v. 12 200-Ft. Reels*, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973), handed down the same day as *Miller*. Footnote 7 in *United States v. 12 200-Ft. Reels*, reads as follows:

"We further note that, while we must leave to state courts the construction of state legislation, we do have a duty to authoritatively construe federal statutes where '"a serious doubt of constitutionality is raised"' and '"a construction of the statute is fairly possible by which the question may be avoided."' *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369, 91 S.Ct. 1400, 1404, 28 L.Ed.2d 822 (1971) (opinion of White, J.), quoting from *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932). If and when such a 'serious doubt' is raised as to the vagueness of the words 'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' or 'immoral' as used to describe regulated material in 19 U.S.C. § 1305(a) [19 U.S.C.S. § 1305(a)] and 18 U.S.C. § 1462 [18 U.S.C.S. § 1462], see *United States v. Orito*, supra, 413 U.S. at 140 n. 1, 93 S.Ct. [2674] at 2676 n. 1, [37 L.Ed.2d at 516] we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hardcore' sexual conduct given as examples in *Miller v. California*, supra, 413 U.S. at 25, 93 S.Ct. [2607] at 2615 [37 L.Ed.2d at 431]. See *United States v. Thirty-Seven Photographs*, supra, 402 U.S. at 369–374, 91 S.Ct. [1400], at 1404–1407 [28 L.Ed.2d 822] (opinion of White, J.). Of course, Congress could always define other specific 'hardcore' conduct."

It is significant that in the concluded portions of every opinion handed down concomitantly with *Miller*, the Supreme Court cites to footnote 7 of *12 200-Ft. Reels* wherein the court construed the *federal* obscenity statutes as incorporating the specific representations and description of hard-core sexual conduct "given as examples in *Miller v. California, supra.*"

The reason why the state court cases were remanded for further proceedings is also disclosed in footnote 7 of *12 200-Ft. Reels*. The court noted that while it had the power to authoritatively construe *federal statutes*, it did not possess the authority with reference to *state statutes*.

This is the reason why whenever any state court judgment (such as *Miller*) was vacated and remanded for further proceedings, the Supreme Court specifically referred the state court to footnote 7 of *United States v. 12 200-Ft. Reels*. I construe these judgments of the Supreme Court of the United States as actually in-

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viting the state courts to authoritatively construe their own state statutes just as the federal statutes were construed by the Supreme Court itself in *12 200-Ft. Reels.*

It seemed clear to me that states are free to proceed with obscenity prosecutions under the new *Miller* standards, so long as the state courts construe and apply state obscenity statutes in a manner consistent with the new *Miller* guidelines.

The only constitutional problem I see in this case is the prior restraint inherent in the injunctive relief granted, but I believe relief could be tailored which would regulate illegal conduct, protect First Amendment rights, and would permit the operation of the business to show films which were not obscene. In short, the trial judge had voluminous evidence before him that the Fox Cinema Theatre was being used for an illegal activity. Faced with this overwhelming evidence of a pattern and practice of illegal conduct, and having determined the obscenity vel non of the films which were shown there, the trial court could have enjoined the further use of the theatre to show films which were (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

Under *Miller*, I believe the trial judge, under authority of Alabama's Red Light Abatement Act could permanently enjoin the use of the theatre for showing *obscene* films and could require anyone desiring to use the theatre for a legitimate purpose to submit a plan which would show the purpose for which the theatre would be used and the trial court could determine promptly whether the proposed use was for a legitimate purpose, using the *Miller* standard, of course.

A California court, using a Red Light Abatement Act, permanently enjoined a tavern, its owner and operator and any other person from maintaining, using or occupying the premises for the purpose of "lewdness," closed the premises to *all* uses for one year except uses not involving entertainment, and ordered the sheriff to remove all fixtures, equipment and musical instruments from the tavern and to close the building for one year. *People ex rel. Hicks v. "Sarong Gals,"* 42 Cal.App.3d 556, 117 Cal.Rptr. 24 (1974).

The common law of public nuisance may be a valid method by which to implement the state's police power in cases such as this one. In *Grove Press Inc. v. City of Philadelphia*, 418 F.2d 82 (3 Cir., 1969), the court held that the court procedures chosen by the city there were improper, but the court spelled out how the city could regulate the showing of obscene films. It said:

"The mischief we perceive in the Pennsylvania equity rules is that there is no guarantee a final hearing will be seasonably scheduled after the issuance of a preliminary injunction and that a prompt decision will be forthcoming thereafter. The preliminary restraint could exist days, and even months, before the judicial decision on the merits; where this possibility exists, an unacceptable threat to the freedom of expression without due process of law results. Failure to provide the necessary expeditiousness tinges the Pennsylvania preliminary injunctive procedures with unconstitutional hues when they are employed to restrain or inhibit expression prior to a final adjudication of an alleged obscene matter.

"We do not challenge, we reiterate, the postulate that 'the primary requirements of decency may be enforced against obscene publications.' *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957). This means that relief may be sought in both the civil and criminal branches of the Pennsylvania court system to enforce state laws on obscenity, consonant with the Due Process Clause of the Fourteenth Amendment and the guar-

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antee of First Amendment expression. It is only when the right of the state to regulate obscenity collides with undue inhibition of protected expression that a problem of constitutional dimension arises. Where expression is inhibited as a result of prompt judicial decision reached after an adversary proceeding; there can be no procedural due process complaint. But where the inhibition occurs in a preliminary proceeding, with no guarantee of a prompt judicial decision on the merits, the procedure is constitutionally defective because a restraint of presumably protected expression not only occurs but is capable of persisting for an unlimited time prior to the required judicial determination.

"Our conclusion is not novel in Pennsylvania jurisprudence. The same basic determination has already been alluded to by Mr. Justice O'Brien, speaking for an evenly divided state Supreme Court in *Commonwealth v. Guild Theatre, Inc.*, 432 Pa. 378, 248 A.2d 45 (1968), where the validity of employing the Pennsylvania equity rules to enjoin obscene exhibitions was also raised. There, the state authorities had secured an ex parte injunction without affording the exhibitors any opportunity to be heard. In ruling such procedures constitutionally defective, Mr. Justice O'Brien observed:

"'However, even if a proper hearing had been held, the instant proceeding was fatally defective in another respect. * * * Although we cannot agree with appellants' contention that no prior restraint on the exhibition of a motion picture is permissible, it is clear that any such restraint must be carefully circumscribed. In *Freedman v. State of Maryland*, 380 U.S. 51, 58, 85 S.Ct. 734, 739, 13 L.Ed.2d 649 (1965) the Supreme Court discussed the "procedural safeguards designed to obviate the dangers of a censorship system." One of these safeguards was a prompt, final judicial decision. * * * The fact that appellants may have been offered a full dress *hearing* within four days of the original restraint does not suffice. Quite clearly, there is no provision for a prompt *decision*. It is vital that the continuance of First Amendment freedoms not be dependent upon the efficiency of a particular judge but upon procedural safeguards clearly embodied in a statute. We can only suggest, as did the Court in *Freedman*, supra, that a model for such a statute which can safeguard both the First Amendment freedoms of exhibitors and publishers, and the freedom from obscenity of society as a whole can be found in *Kinglsey (sic) Books, Inc. v. Brown*, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957). The New York statute there provided for a trial within one day after joinder of issue and a decision within two days of the conclusion of the trial. The instant procedure falls far short of that required.' 248 A.2d at 47–48."

The procedure I suggest, which would require the owner or operator to submit a plan setting out the future course of operation, would constitute some "prior restraint" and "chilling effect," if a prompt decision is made. I believe the test mentioned in *Grove Press* is met. While the protection against prior restraint is an important right, it is not an absolute one. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1947).

Chief Justice Burger commented, in *Miller*, on the spectre of repression which the dissenting Justices feared. He wrote:

"The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a 'misuse of the great guarantees of free spech and free press . . . .' *Breard v. Alexandria*, 341 U.S. at 645, 71 S.Ct. [920], at 934 [95 L.Ed. 1233, 35 ALR2d 335]. The First Amendment protects works which, taken as a whole,

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have serious literary, artistic, political, or scientific value, regardless of whether the government of a majority of the people approve of the ideas these works represent. 'The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people,' *Roth v. United States*, supra, 354 U.S. at 484, 77 S.Ct. [1304], at 1308 [1 L.Ed.2d 1498] (emphasis added). See *Kois v. Wisconsin*, 408 U.S. at 230–232, 92 S.Ct. [2245], at 2246–2247 [33 L.Ed.2d 312]; *Thornhill v. Alabama*, 310 U.S. at 101–102, 60 S. Ct. [736], at 743–744 [84 L.Ed. 1093]. But the public portrayal of hardcore sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.

"There is no evidence, empirical or historical, that the stern 19th century American censorship of public distribution and display of material relating to sex, see *Roth v. United States*, supra, 354 U.S. at 482–485, 77 S.Ct. [1304], at 1307–1309 [1 L.Ed.2d 1498], in any way limited or affected expression of serious literary, artistic, political, or scientific ideas. On the contrary, it is beyond any question that the era following Thomas Jefferson to Theodore Roosevelt was an 'extraordinarily vigorous period,' not just in economics and politics, but in belles lettres and in 'the outlying fields of social and political philosophies.'

"We do not see the harsh hand of censorship of ideas—good or bad, sound or unsound—and 'repression' of political liberty lurking in every state regulation of commercial exploitation of human interest in sex."

Consequently, I believe that the trial judge, although following state law, went too far in restraining the use of the theatre for legitimate purposes. This I do not think he could do, but I think he could ensure that if it was used, it would be for legitimate purposes, and not as it had been.

HEFLIN, Chief Justice (concurring in the result):

I concur in the result of the majority opinion in this cause but disagree with the language which attempts to cure the so-called definitional infirmities in the Alabama Red Light Abatement Act by judicial construction.

The majority opinion attempts to make the reasoning in *Pierce v. State*, 292 Ala. 473, 296 So.2d 218 (1974), applicable to the Alabama Red Light Abatement Act. In *Pierce*, this court engrafted by judicial construction the requirements of *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) to the 1961 Alabama Obscenity Statute to make it constitutional.

While *Miller v. California*, supra, substituted a less stringent prosecutorial requirement than the one developed from *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) and *Memoirs v. Massachusetts*, 383 U.S. 413, 86 S.Ct. 974, 16 L.Ed.2d 1 (1966), in regard to literary, artistic, political or scientific values, it also addressed the issue of limiting specificity necessary for criminal obscenity statutes to withstand constitutional attacks on vagueness and overbreadth grounds.

The majority opinion states that the definitional infirmities in the Alabama Red Light Abatement Act are cured by judicial construction. However, I cannot find in the majority opinion any language by which the requirements of *Miller* are added to the statute in question. I assume that the intent of the majority opinion is to engraft *Miller's* requirements of limiting specificity to the Alabama Red Light Abatement Act. Even if such language did appear in the majority opinion to accomplish such intent, I would, nevertheless maintain that the court does not have the right to judicially engraft these requirements of limiting specificity to the Alabama Red Light Abatement Act.

The following appears in *Miller*:

"This much has been categorically settled by the Court, that obscene material

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is unprotected by the First Amendment. *Kois v. Wisconsin*, 408 U.S. 229, 92 S.Ct. 2245, 33 L.Ed.2d 312 (1972); *United States v. Reidel*, 402 U.S., at 354, 91 S. Ct. [1410], at 1411–1412; *Roth v. United States*, supra, 354 U.S. at 485, 77 S.Ct. [1304], at 1309 'The First and Fourteenth Amendments have never been treated as absolutes [footnote omitted]'. *Breard v. Alexandria*, 341 U.S. at 642, 71 S.Ct. [920], at 932, and cases cited. See *Times Film Corp. v. Chicago*, 365 U.S. 43, 47–50, 81 S.Ct. 391, 393–395, 5 L.Ed.2d 403 (1961); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S., at 502, 72 S.Ct. [777], at 780. We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. *State statutes designed to regulate obscene materials must be carefully limited.* See *Interstate Circuit, Inc. v. Dallas*, supra, 390 U.S. at 682–685, 88 S.Ct. [1298], at 1302–1305. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. • • • A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

"The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin*, supra, 408 U.S. at 230, 92 S.Ct. at 2245, quoting *Roth v. United States*, supra, 354 U.S. at 489, 77 S.Ct. [1304] at 1311; (b) *whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law*; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the 'utterly without redeeming social value' test of *Memoirs v. Massachusetts*, 383 U.S. at 419, 86 S.Ct. [975], at 977 [16 L.Ed.2d 1]; that concept has never commanded the adherence of more than three Justices at one time. • • • See supra, at 2613. *If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary.* See *Kois v. Wisconsin*, supra, 408 U.S. at 232, 92 S.Ct. [2245], at 2247; *Memoirs v. Massachusetts*, supra, 383 U.S. at 459–460, 86 S.Ct. [975], at 998 (Harlan, J., dissenting); *Jacobellis v. Ohio*, 378 U.S., at 204, 84 S.Ct. [1676], at 1686 (Harlan, J., dissenting); *New York Times Co. v. Sullivan*, 376 U.S. 254, 284–285, 84 S.Ct. 710, 728, 11 L.Ed.2d 686 (1964); *Roth v. United States*, supra, 354 U.S. at 497–498, 77 S. Ct. [1304], at 1315–1316 (Harlan, J., concurring and dissenting).

"We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:

> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> "(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." (Emphasis supplied)

One of the requirements in *Miller* was that the statutes designed to regulate obscene matters can not be overly broad but must be carefully limited by legislative act

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or judicial construction. The following language in *Pierce* reflects this court's treatment of this requirement:

"In *Miller*, the court attempted to provide 'positive guidance' to other courts dealing with obscenity issues. *The court recognized 'the inherent dangers of undertaking to regulate any form of expression.' Therefore, the court continued, '[s]tate statutes designed to regulate obscene materials must be carefully limited.' The first limitation mentioned by the court was the scope of the statute: '[W]e now confine the permissible scope of such regulation to works which depict or describe sexual conduct.' Furthermore, '[t]hat conduct must be specifically defined by the applicable state law,* as written or [as] authoritatively construed.' Other guidelines are succinctly stated in the following language:

* * * * * *

"The first issue this court must deal with is whether the statute [the Alabama 1961 Obscenity Statute] contains the necessary specificity as required by *Miller. The U. S. Supreme Court in Miller invites judicial construction as a method of supplying the required specificity if such is absent from the statute.* * * * [T]his court now specifically incorporates the *Miller* guidelines or tests heretofore set out into its construction of the word 'obscene' in Section 374(3). Thus the operation of the provisions of Section 374(4) applicable in this case is limited to matter which depicts or describes sexual conduct. The regulated matter is more specifically restricted to (a) 'Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated,' or (b) 'Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.'." (Emphasis supplied)

From *Miller* it was concluded that in the absence of legislative language supplying the necessary limiting specificity, some state statutes could be judicially construed by engrafting to the statute the necessary limiting specificity and thereby pass constitutional muster. In fact, *Miller* seems to invite judicial construction as a method of supplying the required limiting specificity if such language is absent from the statute. While normally the task of providing limiting specificity to a statute is a legislative function, nevertheless, this court engrafted such limiting specificity to the 1961 Obscenity Statute because of the U. S. Supreme Court's invitation to do so.

Now the majority opinion goes beyond statutes designated to control obscenity and attempts to make the Alabama Red Light Abatement Act a weapon against "hard-core pornography." Obviously, the legislature felt that this act was not an obscenity control statute. This act was passed in 1919 and was on the books when the 1961 Obscenity Act was passed. The 1961 Obscenity Act possesses all of the injunctive relief features which the majority opinion would give to this act. See Title 14, §§ 374(5)-(11), Code of Alabama, 1940, as amended (1958 Recompiled—1973 Cumulative Supp.). Further, there is no invitation from the Supreme Court of the United States for judicial construction to supply the necessary limiting specificity to this statute. I interpret *Miller* as limiting judicial construction engraftments to statutes designed to specifically control obscenity. The act in question is indeed broad and comprehensive in its scope—much more so than the 1961 Obscenity Statute. In my opinion the majority opinion goes beyond the pale of permissible judicial construction and crosses over into the realm of exclusive legislative drafting by attempting to apply the same reasoning as was applied in *Pierce*.

Another reason why I cannot concur in the treatment given by the majority opinion involves a consideration of the residual effects that will inure to the Alabama Red Light Abatement Act following such judicial engraftments. Before such engraftments the act in question was a broad, comprehensive act, useful to the State in fighting battles against prostitution, assig-

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nation and lewdness. If the majority opinion engrafts the requirements of *Miller* to this act then this act will have to be construed in the future in a much more narrow and restricted sense and can only be used as a weapon against prostitution, assignation and hard-core pornography. The former broad protective scope given to "lewdness" is considerably reduced by the majority opinion.

As was previously pointed out, the 1961 Obscenity Act provides within its arsenal injunctive relief from obscene materials. This act can be used to enjoin the showing of obscene motion picture films. There is no real reason to transform the Alabama Red Light Abatement Act into an injunctive relief procedure to combat hard-core pornographic films because such a procedure has been available since 1961.

For the reasons set forth above, I respectfully disagree with certain specified aspects of the majority opinion but feel that the result reached by the majority is correct.

BLOODWORTH and SHORES, JJ., concur.

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APPENDIX E

Judgment of the Supreme Court of Alabama in General Corporation, a corporation v. State of Alabama ex rel. Eugene Sweeton, Chief of Police, City of Huntsville, Alabama, entered on September 18, 1975.

. . . . . E3 - E4

THURSDAY, SEPTEMBER 18, 1975

STATE OF ALABAMA - - - - - - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA
SPECIAL TERM 1975

SC 521

GENERAL CORPORATION, A CORPORATION, ETC.

VS.

STATE OF ALABAMA, ETC.

This cause having been duly argued and submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the circuit court be reversed and annulled and that this cause be remanded to the Court below for further proceedings therein, not inconsistent with the opinion this day rendered by this Court in this cause.

IT IS FURTHER ORDERED AND ADJUDGED that the State of Alabama, on the relation of Eugene Sweeton, Chief of Police of the City of Huntsville, Alabama, pay the cost of appeal in this court and in the court below, for which costs let execution issue.

I, J.O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument herewith set out as same appears of record in said Court.

Witness my hand this 12 day of Jan. 1976.

/s/ J.O. Sentell
Clerk, Supreme Court of Alabama

APPENDIX F

Amendment I of the Constitution of the United States F-3

Amendment XIV of the Constitution of the United States F-3

Alabama Red Light Abatement Act, Title 7, section 7, section 1091 et seq., Code of Alabama 1940, Recompiled 1958. . . . . F4 - F10

Title 14, section 374(16j), Code of Alabama 1940, Recompiled 1958 . . . F10 - F12

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE 2.

ABATEMENT OF CERTAIN NUISANCES.

Sec.
1091. Definitions.
1092. Maintaining nuisance; definition of.
1093. Injunction of nuisance.
1094. When injunction issued before hearing.
1095. Complaint, filing of; temporary injunction.
1096. Restraining order, inventory of property.
1097. Contempt of court, what constitutes.
1098. Service of complaint, when writ granted.
1099. Answer of respondents.
1100. Final decree, when granted.
1101. Closing of premises, pending final decision.
1102. Release of property on bond.
1103. Trial of action; evidence; judgment.
1104. Abatement of nuisance; sale of property.
1105. Claims for goods and property unsold.
1106. Fees of officers selling property, etc.
1107. Nuisance established in criminal action; proceedings under this article.
1108. Contempt proceedings for violation of closing order.

§ 1091. (9280) **Definitions.**—For the purpose of this article, the terms place, person, nuisance are defined as follows: Place shall include any building, erection, or place or any separate part or portion thereof or the ground itself; person shall include any individual, corporation, association, partnership, trustee, lessee, agent or assignee; nuisance shall mean any place as above defined in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, and the personal property and contents used in conducting or maintaining any such place for any such purpose. (1919, p. 52.)

Cross reference.—See note under § 1103 of this title.

Scope of article.—The nuisance dealt with in this article is the maintenance of a place "in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists." Ex parte King, 263 Ala. 487, 83 So. (2d) 241.

This article is not unconstitutional as violative of Constitution, § 45, requiring the subject of legislative acts to be clearly expressed in the title, nor as containing more than one subject. Ridge v. State, 206 Ala. 349, 89 So. 742.

Nor does it violate the due process clause of the Constitution. Ridge v. State, 206 Ala. 349, 89 So. 742.

The confiscation of property is an exercise of the police power.—The authority conferred by this article upon chancery courts to condemn and confiscate property used for criminal or immoral purposes is an exercise of the police power. Ridge v. State, 206 Ala. 349, 89 So. 742.

The proceeding is quasi-criminal in nature.—The proceeding is not a criminal prosecution, though it may be regarded as quasi-criminal, and it is not within the constitutional provisions regulating procedure and protecting accused in criminal prosecutions. Ridge v. State, 206 Ala. 349, 89 So. 742.

Sufficiency of averment.—Averment of nuisance, defined in statutory terms as place of assignation or prostitution, is sufficient. Brown v. State, 222 Ala. 623, 133 So. 913.

Bill to enjoin a breach of covenant is not demurrable under this or the following sections.—A bill to enjoin the breach of a covenant of a negro not to use his own water front for the bathing or picnicking of negroes generally, reserving use by himself, his family, and guests, was based on the right to enjoin a breach of the covenant as such, and was not demurrable for failure to observe the statutory procedure to abate nuisance under this and the following sections of this article. Moseby v. Roche, 233 Ala. 280, 171 So. 351.

Quoted in Howard v. State, 238 Ala. 185, 190 So. 278.

Cited in Ex parte Hill, 229 Ala. 501, 158 So. 531.

Am. Jur. and ALR references.—17 Am. Jur., Disorderly Houses, § 3 et seq.

Constitutionality of statute conferring on chancery courts power to abate bawdy houses as nuisances. 5 ALR 1474, 22 ALR 542, 75 ALR 1298.

Number of females who reside in house or resort thereto for immoral purposes as affecting disorderly character thereof. 12 ALR 529.

§ 1092. (9281) **Maintaining nuisance; definition of.**—Any person who shall use, occupy, establish, or conduct a nuisance as defined in the preceding section, or aid or abet therein, and the owner, agent or lessee of any interest in any such nuisance, together with the person employed in or in control of any such nuisance by any such owner, agent or lessee, shall for the purpose of this article, be guilty of maintaining a nuisance and shall be enjoined as hereinafter provided. (1919, p. 52.)

§ 1093. (9282) **Injunction of nuisance.**—Whenever a nuisance exists, the attorney-general of the state, or the solicitor, his assistant or deputy, or any prosecuting attorney in the county, or any citizen or citizens, may bring an action in equity in the name of the state of Alabama, upon the relation of such attorney-general, or such other officer or person to abate such nuisance and to perpetually enjoin the person or persons maintaining the same from further maintenance thereof. (1919, p. 52.)

Suit may be brought by solicitor or citizen.—Under this section an injunction to abate a nuisance may be brought by the solicitor, his assistant or any citizen on relation of the state and the authority of the attorney general is unnecessary. Rep. Atty. Gen., 1926-28, p. 269.

And solicitor may sign bill brought by state.—A bill by the state to abate a nuisance, averring that the state by the attorney general was complaining and that the state was party complainant, was not subject to demurrer on ground that state was not a "proper party" because bill was signed by state's solicitor instead of attorney general. Gullatt v. State, 243 Ala. 61, 8 So. (2d) 577.

§ 1094. (9283) **When injunction issued before hearing.**—No injunction or restraining order shall be issued before hearing in any action brought by a citizen or citizens under the provisions of this article, unless such citizen or citizens have made bond in such sum as may be fixed by the judge to whom the application for such injunction or restraining order is made, such bond to be approved by the register of the circuit court of the county in which the proceeding is filed and to be payable and conditioned as provided by section 1043 of this title. (1919, p. 52.)

§ 1095. (9284) **Complaint, filing of; temporary injunction.**—Such action shall be brought in the circuit court of the county in which the property is located. At or before the commencement of the action a verified complaint alleging the facts constituting the nuisance shall be filed in the office of the probate judge of the county, together with a notice of the pendency of the action, containing the name of the court, the names of the parties, the object of the action, and a brief description of the property affected thereby. The probate judge shall be paid the usual fee for recording such lis pendens, who shall immediately record such notice. After the filing of the complaint, application for a temporary injunction may be made to the circuit court or a judge thereof or any judge authorized by the laws of the state to make an order for a preliminary injunction, who shall grant a hearing thereon within ten days thereafter. (1919, p. 52.)

Filing of a verified complaint is mandatory. — Filing of verified complaint for record in probate judge's office "at or before" commencement of suit to abate place of prostitution as nuisance is mandatory. Brown v. State, 222 Ala. 623, 133 So. 913.

Probate judge must record.—In proceedings to abate a nuisance under this article, probate judge must record the verified complaint and the lis pendens notice filed in his office under this section. Rep. Atty. Gen., Jan.-Mar., 1941, p. 221.

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Thus, the failure to aver filing is demurrable.—Failure to aver filing of verified complaint in probate judge's office in bill to abate place of prostitution as nuisance was presented by general demurrer. Brown v. State, 222 Ala. 623, 133 So. 913.

Bill to abate place of prostitution as nuisance need not be verified by one having knowledge of facts. Brown v. State, 222 Ala. 623, 133 So. 913.

Where affiant, the solicitor, deposed "that he is informed and believes and upon such information and belief says that the allegations and averments contained in the foregoing bill of complaint are true," this was the approved form of verification. Brown v. State, 222 Ala. 623, 133 So. 913.

Cited in Stephens v. State, 257 Ala. 375, 59 So. (2d) 69.

§ 1096. (9285) **Restraining order, inventory of property.**—Where such application for a temporary injunction has been made, the court or judge thereof may, on the application of the complainant, issue an ex parte restraining order, restraining the respondents and all other persons from the moving or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court or judge granting or refusing such temporary injunction, and until the further order of the court thereon. The restraining order may be served by handing to and leaving a copy of said order with any person in charge of said place or residing therein, or by posting a copy thereof in a conspicuous place at, or upon one or more of the principal doors or entrances to such places, or the judge may order it served on the parties defendant. The officer serving such restraining order shall forthwith make and return into the court, an inventory of the personal property and contents situated in and used in conducting and maintaining such nuisance. (1919, p. 52.)

§ 1097. (9286) **Contempt of court, what constitutes.**—Any violation of such restraining order shall be a contempt of court, and where such order is so posted, mutilation or removal thereof, while the same remains in force, shall be a contempt of court. (1919, p. 52.)

§ 1098. (9287) **Service of complaint, when writ granted.**—A copy of the complaint together with a notice of the time and place of the hearing of the application for a temporary injunction shall be served upon the respondents at least five days before such hearing. If the hearing be then continued at the instance of any respondent, the temporary writ as prayed shall be granted as a matter of course. (1919, p. 52.)

§ 1099. (9288) **Answer of respondents.**—Each respondent so notified shall serve upon the complainant or the attorney filing the bill, a verified answer on or before the date fixed in said notice for said hearing and such answer shall be filed with the register of the court wherein such cause is triable, but the court or judge may allow additional time for answering, providing such extension of time shall not prevent the issuing of said temporary writ as prayed for. (1919, p. 52.)

§ 1100. (9289) **Final decree, when granted.**—If upon the final hearing, the allegations be sustained to the satisfaction of the court or judge, the court or judge shall make a decree restraining the respondents and all other person or persons from continuing the nuisance. When any injunction has been granted, it shall be binding on the respondents throughout the county. Any violation thereof shall be contempt of court and punished as hereinafter provided. (1919, p. 52.)

§ 1101. (9290) **Closing of premises, pending final decision.**—If on the hearing for a temporary injunction, it shall further appear that the

person owning, in control, or in charge of the nuisance so enjoined has received five days' notice of the hearing, and unless such person shall show to the satisfaction of the court or judge that the nuisance complained of has been abated, the court or judge shall issue an order closing the place against its use for any purpose until final decision shall be rendered on the application for a permanent injunction. Such order shall also continue in effect for such further period the restraining order above provided if already issued, or if not issued, shall include such an order restraining, for such period, the removal or interference with the personal property and contents located thereat or therein as hereinbefore provided, and such restraining order shall be served and the inventory of such property shall be made and filed as hereinbefore provided. (1919, p. 52.)

Cross reference.—For release of property on bond, see § 1102 of this title and the note thereto.

This section and section 1102 apply to abatement of nuisances in liquor cases.—This section providing for the closing of premises constituting a nuisance pending the final decision of an application for a permanent injunction, and § 1102 of this article providing for a release of the property on bond, apply to cases of abatement of liquor nuisances, but contemplate resort to a closing order only after notice and hearing. Ex parte Harvell, 235 Ala. 63, 177 So. 345.

The provisions as to padlock proceedings contained in this and the following sections of this title are applicable to padlock proceedings under Title 29, section 141. Rep. Atty. Gen., Quar. Rep. April-June 1939, p. 149.

In proceedings for the abatement of a liquor nuisance, the preliminary injunction was improper in so far as it related to the matter of padlocking defendant's premises without notice or hearing, and denying defendant's right to reopen the premises for lawful purposes on the execution of a bond. Ex parte Harvell, 235 Ala. 63, 177 So. 345.

§ 1102. (9291) Release of property on bond.—The owner or owners of any real property or personal property so closed or restrained, or to be closed or restrained, may appear at any time between the filing of the complaint and the hearing of the application for a permanent injunction and, upon payment of all costs incurred, and upon the filing of a bond payable to the state by the owner of the real property, with sureties, or a surety company, to be approved by the register, in the full value of the property to be ascertained by the court, or the judge, conditioned that such owner or owners will immediately abate the nuisance and prevent the same from being established or kept until the decision of the court or judge shall have been rendered on the application for a permanent injunction, then, in that case, the court or judge, if satisfied of the good faith of the owner of the real property and of innocence on the part of any owner of the personal property of any knowledge of the use of such personal property as a nuisance, and that with reasonable care and diligence such owner could not have known thereof, shall deliver such real or personal property, or both, to the respective owners thereof, and cancel or refrain from issuing at the time of the hearing on the application for the injunction as the case may be, any order or orders closing such real property or restraining the removal or interference with such personal property. The release of any personal property or real property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subjected by law. (1919, p. 52.)

This section authorizes a release of the property upon the execution of sufficient bond.—This section provides for the release of the property, upon execution of bonds to secure against its use for unlawful purposes, pending the hearing of the cause, that is to say, in the interim between the filing of the bill of complaint and the chancellor's final decree thereon. Rep. Atty. Gen., Quar. Rep., April-June 1939, p. 150.

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It and section 1101 apply to cases of abatement of liquor nuisances.—Section 1101 of this article, providing for the closing of premises constituting a nuisance pending the final decision of an application for a permanent injunction, and this section apply to cases of abatement of liquor nuisances, but contemplate resort to a closing order only after notice and hearing. Ex parte Harvell, 235 Ala. 63, 177 So. 345.

Property used in the maintenance of a liquor nuisance should be padlocked only if necessary to enforce the law. Garrett v. State, 235 Ala. 457, 179 So. 636.

Padlocking of property, used in the maintenance of a liquor nuisance by one shown to be a persistent violator of the law, is proper, but should be modified on sufficient showing that the property will not be again employed in the conduct of such nuisance. Garrett v. State, 235 Ala. 457, 179 So. 636.

Circuit court in equity could not punish for single violation of liquor nuisance injunction exceeding statutory penalty although court might require bond or padlocked premises to secure observance of injunction. Ex parte Hill, 229 Ala. 501, 158 So. 531.

Jurisdiction retained to enter future orders.—A decree, enjoining the continuance of a liquor nuisance, requiring a bond to abide thereby and padlocking the property on the failure to execute a bond, properly retained jurisdiction to enter proper orders in the future. Garrett v. State, 235 Ala. 457, 179 So. 636.

Certiorari as a proper remedy in padlock proceedings.—Certiorari was the petitioner's proper remedy, where his premises, allegedly constituting a liquor nuisance, were ordered padlocked by a preliminary order for injunction without notice or hearing and where petitioner was not permitted to reopen his premises for lawful purposes on execution of a bond. Ex parte Harvell, 235 Ala. 63, 177 So. 345.

§ 1103. (9292) **Trial of action; evidence; judgment.**—The action when brought shall have precedence over all other cases except injunctions. In such action, evidence of the general reputation of the place or any admission or finding of guilt of any person under the original laws against prostitution, lewdness, or assignation, at any such place shall be admissible for the purpose of proving the existence of said nuisance and shall be prima facie evidence of such nuisance and of knowledge of, and acquiesence and participation therein, on the part of the person or persons charged with maintaining such nuisance as herein defined. If the complaint is filed for the state by a citizen of the county, it shall not be dismissed except upon a sworn statement of the complainant or his personal representative or agent, and his attorney or of the officer filing the complaint, setting forth the reasons why the action should be dismissed and the dismissal be approved by the attorney filing the bill in writing or in open court. If the court or judge is of the opinion that the action ought not to be dismissed, he may direct the solicitor to prosecute such action to judgment at the expense of the county, and if the action is continued more than once, any person who is a citizen of the county, or the attorney-general or the solicitor may be substituted for the complainant and prosecute said action to judgment. If the action is brought by a person who is a citizen of the county and the court finds that there were no reasonable grounds or cause for said action, the costs may be taxed against such person. If the existence of the nuisance be established upon the trial, a judgment shall be entered which shall perpetually enjoin the respondents and any other person or persons from further maintaining the nuisance at the place complained of and the respondents from maintaining such nuisance elsewhere in the county. (1919, p. 52.)

Scope of power to enjoin.—Power is conferred upon equity courts by this section to enjoin the defendants perpetually, in a proceeding to abate a public nuisance as defined in § 1091 of this title, from further maintaining the particular nuisance at the place complained of or elsewhere in the county. Young v. State, 253 Ala. 312, 45 So. (2d) 29.

§ 1104. (9293) **Abatement of nuisance; sale of property.**—If the existence of the nuisance be admitted or established in an action as provided in this article, or in a criminal proceeding in the circuit court, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance, and not already released under authority of the court as provided in sections 1095-1102 of this title, and shall direct the sale of such thereof as belonged to the respondents notified or appearing, in the manner provided for the sale of chattels under execution. Such order shall also require the renewal for one year of any bond furnished by the owner of the real property as provided in section 1102 of this title, or if not so furnished, shall continue for one year any closing order issued at the time of granting the temporary injunction, or if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose, and so keeping it closed for a period of one year unless sooner released; but the owner of the place so closed and not released under bond as hereinbefore provided may now appear and obtain such release in the manner and upon fulfilling the requirements as hereinbefore provided. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law. (1919, p. 52.)

Jurisdiction is retained to enter further orders.—Where the charge of maintaining a liquor nuisance is sustained by the evidence and a decree is entered enjoining the continuance of such nuisance, requiring bond conditioned to abide the decree, and padlocking the property on the failure to execute a bond, the court retains jurisdiction to enter proper orders in the future. Garrett v. State, 235 Ala. 457, 179 So. 636.

Property may be released pending appeal from final decree.—By this section the chancellor has authority to make an order authorizing the release of the property pending the appeal from his final decree. Rep. Atty. Gen., Quar. Rep., April-June 1939, p. 149.

§ 1105. (9294) **Claims for goods and property unsold.**—Owners of unsold property and contents so seized must appear and claim same within ten days after such order of abatement is made and prove innocence to the satisfaction of the court, of any knowledge of said use thereof and that with reasonable care and diligence they could not have known thereof. Every defendant in the action shall be presumed to have had knowledge of the general reputation of the place. If such innocence be so established, such unsold personal property and contents shall be delivered to the owner; otherwise, it shall be sold as hereinbefore provided. If any person shall break and enter or use a place so directed to be closed, he shall be punished for contempt as provided hereinafter. (1919, p. 52.)

§ 1106. (9295) **Fees of officers selling property, etc.**—For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying and selling like property on execution; and for closing the place and keeping it closed, a reasonable fee shall be allowed by the court. (1919, p. 52.)

§ 1107. (9296) **Nuisance established in criminal action; proceedings under this article.**—In case the existence of such nuisance is established in a criminal proceeding in a court not having equitable jurisdiction, the solicitor or prosecuting officer shall proceed promptly under this article to enforce the provisions and penalties thereof, and the finding of the defendant guilty in such criminal proceedings, unless reversed or set aside,

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shall be conclusive as against the defendant as to the existence of the nuisance. The proceeds of the sale of the personal property, as provided in the preceding section, shall be applied in payment of the costs of the action and abatement including the complainant's costs, or so much of such proceeds as may be necessary, except as hereinafter provided. (1919, p. 52.)

§ 1108. (9297) **Contempt proceedings for violation of closing order.**—In case of the violation of any injunction or closing order granted under the provisions of this article, or of any restraining order or the commission of any contempt of court in proceedings under this article, the court, or the judge thereof, may summarily try and punish the offender. The proceedings shall be commenced by filing with the register of the court a complaint under oath, setting out and alleging facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested; he may be released on bond, pending the hearing, to be fixed by the judge. The trial may be had upon affidavits, or either party may demand the production and oral examination of witnesses. A party found guilty of contempt, under the provisions of this article, shall be punished by a fine of not less than one hundred dollars nor more than two hundred dollars, or by imprisonment in the county jail not less than one nor more than three months, or by both such fine and imprisonment. (1919, p. 52.)

This section is constitutional. Ridge v. State, 206 Ala. 349, 351, 89 So. 742.

This section does not apply to operation of a liquor place in alleged violation of a zoning ordinance, since it applies only when a party is found guilty of contempt in the maintenance of a place "in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists." Ex parte King, 263 Ala. 487, 83 So. (2d) 241.

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CHAPTER 64C.

SALE, EXHIBITION, ETC., OF OBSCENE MATERIALS TO PERSONS OVER EIGHTEEN.

Sec.
374(16j). Definitions.
374(16k). Sale, etc., of certain materials unlawful.
374(16l). Exhibition, etc., of certain shows or presentations unlawful.
374(16m). Notice required before commencement of prosecution; action for declaratory judgment.
374(16n). Penalties.
374(16o). Chapter cumulative.

§ 374(16j). Definitions.—As used in this chapter.

(a) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(b) "Sexual conduct" means act of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(c) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(d) "Sado-masochistic abuse" means flagellation or torture by or upon a

person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Obscene" means that description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) Predominantly appeals to the prurient, shameful or morbid interest, and (ii) is patently offensive to prevailing or contemporary standards in the adult community as a whole with respect to what is suitable material, and (iii) is utterly without redeeming social value or importance.

(g) "Hard-core pornography" means material, when considered as a whole, its predominant appeal is to prurient interest, is patently offensive to prevailing or contemporary standards, is utterly without redeeming social value or importance and in addition it goes substantially beyond customary limits of candor in describing or representing such matters.

(h) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both:

(i) The character and content of any material described herein which is reasonably susceptible of examination by the defendant.

(ii) Such term includes the calculated purveyance of filth.

(i) Mailable matter means (a) printed or written matter or material having second-class mailing privileges under the laws of the United States; or (b) any other printed or written matter or material which has not been determined to be nonmailable under the laws of the United States. (1969, p. 1253, § 1, appvd. Sept. 10, 1969.)

Applied in Grove Press, Inc. v. Bailey, 318 F. Supp. 244 (N.D. Ala. 1970).

§ 374(16k). Sale, etc., of certain materials unlawful.—It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a person eighteen years of age or older:

(a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is obscene or represents hard-core pornography.

(b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of section 374(16k) hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is obscene or represents hard-core pornography.

(c) Nothing in this section shall be deemed to apply to mailable mattter unless such mailable matter is known by such person to have been judicially found to be obscene or to represent hard-core pornography under this chapter or under the provisions of any other Alabama statutes. (1969, p. 1254, § 2, appvd. Sept. 10, 1969.)

§ 374(16l). Exhibition, etc., of certain shows or presentations unlawful.—It shall be unlawful for any person knowingly to exhibit for a monetary consideration to another or knowingly to sell to another an admission ticket or pass or knowingly to admit another for a monetary con-

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sideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse which is obscene or represents hard-core pornography. (1969, p. 1254, § 3, appvd. Sept. 10, 1969.)

§ 374(16m). Notice required before commencement of prosecution; action for declaratory judgment.—(a) No prosecution may be commenced against any person for violating sections 374(16k) and 374(16l) of this title unless the accused is first served with prior written notice that there is reasonable cause to believe the material upon which such prosecution is based violates this chapter, and the accused has, after receiving such notice violated this chapter.

(b) The written notice provided for in paragraph (a) of this section 374(16m) may be given by only the following officials; the state attorney general and any assistant attorney general; the district attorney, county solicitor, their assistants and deputies, or any person whose office and duty is to prosecute criminal actions before any state, county or municipal court; the sheriff; the chief of police of any municipality or town; and the duly authorized law enforcement employees of the department of public safety.

(c) Any person receiving such written notice provided for in paragraph (a) of this section 374(16m) shall have the right within 30 days from such notice to file an appropriate action for declaratory judgment to determine the validity of such written notice, but no such action shall, by reason of the commencement thereof, stay or in any way delay or postpone any prosecution for the violation of this chapter. (1969, p. 1254, § 4, appvd. Sept. 10, 1969.)

Subsequent showing of film after notice received forms basis of criminal prosecution. — This section purports only to regulate the distribution of material, i.e., motion pictures, as to which there has been a viewing, a determination of obscenity by those empowered to make such a finding, and proper notice given to the distributor in relation thereto. It is thus the subsequent showing of that same film or films after receiving such notice which forms the basis for a criminal prosecution. McKinney v. City of Tuscaloosa, 49 Ala. App. 21, 268 So. 2d 488 (1972).

Where there was no subsequent showing of films which were the subject of the notice given, the police did not follow the procedural safeguards of this section. McKinney v. City of Tuscaloosa, 49 Ala. App. 21, 268 So. 2d 488 (1972).

§ 374(16n). Penalties.—Any person, firm or corporation violating any provision of this chapter shall be guilty of a misdemeanor and upon conviction shall be imprisoned in the county jail or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars ($2,000.00) for each offense, or be both so imprisoned and fined, in the discretion of the court. (1969, p. 1255, § 5, appvd. Sept. 10, 1969.)

§ 374(16o). Chapter cumulative. — The provisions of this chapter are cumulative and shall be in addition to any and all laws now enacted dealing with obscene or hard-core pornography and shall not be construed to limit or repeal other laws on such matters and shall specifically apply to the exposing of obscene and harmful materials to persons eighteen years of age and older. (1969, p. 1255, § 6, appvd. Sept. 10, 1969.)

Supreme Court, U. S.
FILED
1976

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1011

STATE OF ALABAMA ex rel. EUGENE SWEETON, Chief of Police, City of Huntsville, Alabama, Petitioner

VS.

GENERAL CORPORATION, a corporation, Respondent

On Petition for a Writ of Certiorari to The Supreme Court of Alabama

Brief for Respondent in Opposition

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OPINION BELOW

The opinion of the Alabama Supreme Court filed on September 18, 1975, is reported in **General Corporation v. State of Alabama ex rel. Eugene Sweeton, Chief of Police, City of Huntsville, Alabama**, 320 So. 2d 668.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

The respondent would respectfully submit that a better statement of the questions presented is as follows:

1. Can the Alabama Nuisance or Red Light Abatement Act, Title VII, Section 1091 et seq. Code of Alabama, 1940, Recompiled 1958, be constitutionally applied to a motion picture theatre or is it an unconstitutional prior restraint?

2. Do the statutory provisions of the Alabama Red Light Abatement Act provide the minimum procedural safeguards required to be offered to motion pictures including notice, an adversary hearing, prompt judicial decision, burden of proof upon the State, proof of reputation admissible to establish prima facie case and lack of statutory provisions for a hearing focusing searchingly on the question of obscenity?

3. Is the Alabama Red Light Abstract Act in violation of due process and a prior restraint in that each motion picture must be judged upon its own merits; and the requirement of bond of the owners, the selling of personal properties, the closing of the theatres for one year and other matters permitted by the Nuisance Statute are in violation of the First and Fourteenth Amendment rights?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Alabama Red Light Statute and constitutional provisions are set forth in the Petition.

STATEMENT OF CASE

The Alabama Supreme Court in an opinion by four of the Justices found as unconstitutional and a prior restraint the prospective abatement of movie houses as public nuisances. This group of four judges found that the Red Light statute could adopt the Miller standards for defining lewdness as being obscenity. It stated in **dicta** that statute might pass muster for an injunction in the future against a particular film or if the films were shown in a drive-in theatre.

One judge concurred in the result with no opinion. Judge Maddox concurred that the injunction was improper as to a showing of **any** film but thought an injunction might be drafted so as to specifically define the type of films probibited in the future.

The Chief Justice and two others joined him in an opinion concurring in the results but disagreed with the language which attempts to cure the so-called definitional infirmities by judicial construction, that is the engrafting of Miller. Eight of the nine judges therefore concurred that the nuisance statute could not be applied to motion picture theatres to close them.

The case was brought by the Chief of Police **as a private citizen** and this private citizen aspect was emphasized by petitioner. One or two motion pictures were produced and shown. There were several time and motion studies introduced over

objections which do not show the entire film to be judged by the Court. Although other movies were alleged to be obscene, there was no proof as to what the contents or the names of any of these motion pictures were.

In supplement to the petitioner's statement of facts, there was entered a pretrial order on February 13, which set forth the issues of the hearing. Eugene Sweeton, the petitioner, claimed the issue of whether the showing of motion pictures constitutes lewdness as contemplated by the statute and the sole conduct of showing such motion pictures was sufficient to be abated as a nuisance. The theatre contended that the films were not lewd, that the nuisance statute was not the proper remedy and violated the First and Fourteenth Amendments. In the alternative, if the nuisance statute was a proper remedy, the statutory provisions were improper and in violation of the First and Fourteenth Amendments. Further, the Chief of Police had an adequate remedy of law under the obscenity statutes and the nuisance statute was not designed to prohibit the showing of motion pictures as alleged in the bill. A supplemental pretrial order was issued which reserved any issue except whether the showing of motion picture films in an enclosed theatre where admission is gained by adults is sufficient to constitute lewdness under the nuisance statute.

The Court did enter a final decree that the theatres were operating as a nuisance, that the

nuisance statute could be applied when the claim of nuisance was solely the showing of motion pictures and issued a permanent injunction closing the Fox Theatre for any purposes for a period of one (1) year and prohibiting the corporation from maintaining a nuisance at the Fox Theatre or elsewhere in the county.

General Corporation with others filed suit thereafter in the United States District Court for the Northern District of Alabama against Eugene Sweeton and others charging there had been an unconstitutional application of the nuisance statute against the theatre and that certain provisions of the statute were unconstitutional. A temporary restraining order issued on March 8, 1973, which resulted in the Amendment to the Decree filed on March 23, 1973 in the State Court. The three judge district court considered this cause in connection with **M.T.M., Inc. v. Baxley** and concluded that federal intervention as requested by the theatre would be improper. General Corporation did not choose to appeal from the three judge district court as did M.T.M., Inc. but pursued its remedy through its appeal to the Alabama Supreme Court resulting in this decision. This Court found that there was no jurisdiction to appeal and remanded the case of **M.T.M.** so that a timely appeal could be prosecuted to the Court of Appeals. **M.T.M., Inc. v. Baxley,** ..... U.S. ..... 95 S. Ct. 1278.

The Alabama Supreme Court found as stated

above and would remand the cause for further proceedings not inconsistent with its opinion.

ARGUMENT

1. THE FEDERAL QUESTION IS NOT SUBSTANTIAL.

The petitioner lists a number of cases before the Court in past terms which were decided or remanded for certain reasons. For example, in **Art Theatre Guild, Inc. et al. v. Clark L. Ewing,** this Court on April 21, 1975, dismissed the appeal for want of a substantial federal question. ..... U.S. ..... 44 Law Edition 2d 82, 95 S. Ct. 1649. That case arose from Ohio which appears to be the most prolific in producing nuisance cases. Some brought by Mr. Charles Keating and some by others and represented in the most part by counsel for petitioner herein on behalf of the Citizens for Decent Literature. The Ohio Supreme Court, however, limited the application of the nuisance statute to the showing of the particular film declared to be obscene. The owner of the property could have the theatre reopened on the basis that he would not play the particular film declared obscene. The Court stating:

> "The release provisions do not, as appellant contends, require the owner to show that no film to be exhibited during the one-year period will be obscene. Such a requirement would not only be impossible, as a practical matter, but also would be an unconstitutional prior restraint

on an activity generally protected by the First Amendment."

307 N. E. 2d at 918.

A number of states have found that their nuisance statutes by their very terms could not be applied to a motion pictures theatre, that the statutes were a prior restraint or that the provisions of the statutes did not have procedural safeguards necessary. Among these are **Sanders v. Sate,** 231 Ga. 608, 203 S. E. 2d 153; **State of Iowa ex rel Facats v. N.D.D., Inc.** d/b/a **Marion Adult Theatres and Richard Haes,** 228 N.W. 2d 191 (Iowa, April 16, 1975); **Gulf States Theatres of Louisiana, Inc. v. Richardson, et al.,** 287 So. 2d 480 (La. December 3, 1973; **State of Indiana ex rel Blee v. Mohney Enterprises, et al.** 289 N. E. 2d 519 (Ind. 1973); **Commonwealth of Pennsylvania v. McDonald,** 347 A. 2d 290 (Pa. 1975); **Mini-Art Operating Company v. State,** 486 S. W. 2d 8 (Ark. 1972); **Southland Theatres, Inc. v. State of Arkansas ex rel Tucker,** 492 S.W. 2d 421 (Ark. 1973); **Southland Theatres, Inc. v. State of Arkansas ex rel Tucker,** 495 S.W. 2d 148 (Ark. 1973); **People v. Goldman,** 287 N. E. 2d 177 (Ill. 1972); **State of Oklahoma ex rel Field v. Hess,** 540 P. 2d 1165 (Okla. 1975).

A more likely candidate for consideration by this Court dealing with the applicability of a nuisance statute made specifically applicable to motion picture theatres is a decision of a three judge court in Texas in **Universal Amusement Company, Inc. v**

Vance, 404 F. Supp. 33 (July, 1975). The nuisance portion of the case has been appealed by the State of Texas to the United States Court of Appeals for the Fifth Circuit where said appeal is now pending.

A decision on the Tennessee nuisance statute was not appealed by the State of Tennessee and such statute could not be applied to a motion picture theatre. See **Airways Theatre, Inc. v. Canale,** 366 F. Supp. 343 (W. D. Tenn, 1973).

The Alabama Red Light Abatement Statute raises a number of issues and would not allow the critical padlock issue **only** to be decided by this Court.

The Alabama statute construed the word "lewdness" to include the application of the statute to a motion picture theatre showing allegedly obscene motion pictures. The statute as drafted in 1919 does not appear to apply to motion pictures at all and was so contended by the respondent in the lower court. In addition, the concurring opinion by the Chief Justice of the Alabama Supreme Court concurred in by two other justices points out that the **1961 Obscenity Act,** Title 14, Secs. 374 (5)-(11) can be used to enjoin the showing of obscene motion picture films and there is no real reason to transform the Alabama Red Light Abatement Act into an injunctive procedure because such procedure has been available since 1961. Of course, this would limit the injunction to the showing of a particular motion picture film.

The provisions of the Alabama Red Light Abatement Statute are directed toward conduct, that is lewdness, assignation or prostitution by live individuals as opposed to that shown upon Celluloid film. The petitioner, however, seeks to state there is no First Amendment question in invoking the nuisance document.

The petitioner attempts to state that the State's power to protect morals allows the State to act. However, the arsenal of weapons put to use against obscenity is not unlimited. There is, of course, a criminal prosecution. Additionally, an injunctive type procedure aimed at one motion picture or one book based upon the models found in **Kingsley Books v. Brown,** 354 U. S. 437, 77 S. Ct. 1325 is available. A properly drawn statute might be available against outdoor motion pictures theatres and is certainly not foreclosed by the Court's decision in **Erznoznik v. City of Jacksonville,** ..... U.S. ..... 95 S. Ct. 2268.

Respondent contends that the consideration by the Court of the Alabama Red Light Abatement Statute would not be limited to one critical padlock issue. If the Court considered this statute, it should consider its various provisions as well as its applicability to motion pictures at all.

Among these issues would be the following:

1. The nuisance statute cannot be construed as applying to motion picture theatres.

2. A nuisance cannot be asserted against a motion picture theatre since each particular motion picture must be judged on its own. Use of the nuisance statute would be tantamount and would be a classic example of prior restraint or censorship.

3. Nuisance is too general and too vague and indefinite and so are the words "lewd" or "lewdness".

4. There are no procedural safeguards built into the nuisance statutes such as a prompt judicial hearing, a provision for a prompt judicial determination after hearing, and the burden of proof upon the censor.

5. The statute allows evidence of general reputation to establish a prima facie case which under First Amendment rights is impermissible.

6. A provision for the closing of the theatre for any purpose for a year, the sale of personal property and a requirement of a bond in the full amount by the owner in order to allow any use of the property by the owner on threatened punishment for contempt of court.

Traditionally, the nuisance has been applied to prostitution, gambling and liquor and it should not be applied to motion picture theatres under this general nuisance law adopted by the State of Alabama.

Respondent, therefore, contends there is no substantial federal question.

BACK DOOR METHOD

The use of a nuisance statute for the purpose of closing a theatre which may or may not have shown an obscene motion picture is using the back door as an attempted control for obscenity. It is a classic prior restraint and the decision of the Alabama Supreme Court is correct.

The arsenal by which the state may control obscenity has several weapons which have been listed above. However, these weapons should be exercised after giving due regard to the rights protected by the First and Fourteenth Amendments. The nuisance statute lacks both procedural safeguards. The statute provides that proof of prohibited acts such as proof of convictions can be introduced as well as evidence of **general reputation** in order to establish a nuisance. The statute provides for a temporary injunction with the operator of the property to show to the satisfaction of the Court that the nuisance complained of has been abated and if not, the Court **shall** issue an order closing the place until a final decision has been rendered. Although this was not done in this case, the statute clearly provides for such a method. There is no provision for a prompt decision as required in such cases as **Freedman v. Maryland,** 380 U. S. 51. The statute provides for the closing of the property for any purposes for a period of one (1) year. It does permit the release upon the placing of a bond in the full amount of the value of the property including the fact that contempt cita-

tions could be used if there were any alleged violations with the burden upon the motion picture operator to show that nothing was being violated.

Such a statute does not have the sensitive tools necessary in dealing with the area of obscenity and free speech. A state is not free to adopt whatever procedures it pleases for dealing with obscenity.

Respondent contends that the attempted use of the Red Light Abatement Statutes designed for prostitution, liquor and gambling is an attempt to use the back door against obscenity. The statute is not applicable and does not have the procedural safeguards. The attempt to use such a vague, sprawling nuisance doctrine should not be permitted.

The respondent respectively relies upon the state cases cited for the reasoning that the nuisance statute should not be applicable to the closing of a theatre for one (1) year. Certainly, an injunction against a particular film might be permissible under a properly drawn statute with procedure safeguards. The Alabama Public Nuisance Statute does not have either those safeguards or language to be applicable to the injunction of one particular film.

The attempt by the petitioner to use some type of mystical logical reasoning of major and minor premises leaves out various factors such as that each motion picture must be judged upon its own and that an attempted control of free speech and expression by motion pictures requires very sensitive tools.

CONCLUSION

Respondent submits that the decision of the Alabama Supreme Court as to prior restraint was proper. Although respondent did not agree that certain procedural provisions therein were proper, respondent respectfully submits that the decision below on prior restraint is clearly correct and the petition for a writ of certiorari should be denied.

Respectfully submitted,
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this ..... day of March, 1976, two copies of the within Brief in Opposition for Petition for Writ of Certiorari were mailed, postage prepaid, to Charles H. Younger and James J. Clancy at their respective addresses. I further certify that all parties required to be served have been served.

Frierson M. Graves, Jr.,
Attorney for Respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975
No. 75-1011

STATE OF ALABAMA ex rel. EUGENE SWEETON,
Chief of Police, City of Huntsville, Alabama

Petitioner,

vs.

GENERAL CORPORATION, a corporation,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

REPLY AND SUPPLEMENTAL BRIEF

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Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

REPLY AND SUPPLEMENTAL BRIEF

Pursuant to Rule 24(4) and (5) of the Rules of the Supreme Court of the United States, Petitioner submits the within Reply and Supplemental Brief for the consideration of the members of this Court.

I

THE ALABAMA SUPREME COURT RULING THAT THE ALABAMA RED LIGHT ABATEMENT STATUTE APPLIES TO A THEATER SHOWING OBSCENE FILMS AS A REGULAR COURSE OF CONDUCT WAS A "MAJORITY" DECISION OF THAT COURT.

The manner in which the Respondent has drafted his statement of the case (See Brief for Respondent in Opposition at page 3) suggests that the decision of the Alabama Supreme Court was not a majority decision. If that implication was intended, such is clearly in error. The four Associate Justices in the lead opinion (Associate Justices Almon, Merrill, Faulkner and Emery) and Associate Justice Maddox, who concurred specially, constituted a majority of five.[1/] See General

1. One of the basic postulates of the American case law system is that the decision of a majority determines the result, and an "opinion of the court" is written expressing the reasoning agreed upon by the majority. When a majority agree on the result, the decision is final as between the litigants. When a majority agree in the reasoning for the result, the opinion which expresses this reasoning is called the "opinion of the court." See Wambaugh, The Study of Cases (Second Edition, 1894), at page 50:

> "Even when all the judges concur in the result, the value of the case as an authority may be diminished and almost wholly destroyed by the fact that the reasons given by the several judges differ materially. . . . 'There must be a concurrence of a majority of the judges upon

Corporation v. State ex rel Sweeton, 320 So.2d 668 (Sept. 18, 1975). Not only did Justice Maddox agree with the lead opinion that the Alabama Red Light Abatement Act did apply to a theater which engaged in a course of conduct of the type established by the proof at the trial (exhibiting obscene motion pictures, daily, for a continuous period of five weeks, during which period eight films were exhibited, all of which were held to be obscene) but he saw less of a "prior restraint" constitutional problem than did the others. See General Corporation v. State ex rel. Sweeton, 320 So.2d 668 at 679 et seq.

II

THIS COURT MUST ACCEPT THE ALABAMA SUPREME COURT'S CONSTRUCTION THAT THE ALABAMA RED LIGHT ABATEMENT STATUTE APPLIES TO A THEATER SHOWING OBSCENE FILMS AS A REGULAR COURSE OF CONDUCT.

Respondent's argument, at page 10 of its Brief in Opposition, that:

"Traditionally, the nuisance has been applied to prostitution, gambling and liquor

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the principles, rules of law, announced in the case, before they can be considered settled by a decision.' "

and it should not be applied to motion picture theaters under this general nuisance law adopted by the State of Alabama..."

is inapposite to the petition for writ of certiorari herein. A majority of the justices on the Alabama Supreme Court having held that the Red Light Abatement Act was applicable, this Court must accept that state court's construction of the Alabama Legislature's language, and proceed to test its validity on that basis. Kingsley Pictures Corporation v. Regents, 360 U.S. 684, 688, 3 L.Ed.2d 1512, 1516, 79 S.Ct. 1362 (June 29, 1959).

Petitioner submits that the real question is not whether the statute should be applied to a theater showing films, but whether the statute is being applied in a constitutional manner, and whether the proof which was tendered at the trial overcame the first amendment presumption regarding "protected materials", customarily afforded motion picture films. To answer that question, this Court need only look to the trial facts and make its own determination that a first amendment problem does not exist, except as to the right of the Alabama legislature to apply a "padlock" penalty.

III

RESPONDENT'S CONTENTION THAT THE PETITION HEREIN RAISES SUBSTANTIAL FEDERAL QUESTIONS BEYOND THAT OF THE CRITICAL PADLOCK PENALTY, FLIES IN THE FACE OF THIS COURT'S RECENT RULING IN ART THEATER GUILD, INC. ET AL. V. CLARK L. EWING.

At the "conclusion" to its Petition for a Writ of Certiorari, Petitioner argues that:

> "the procedural aspect of this case identifies it as an ideal vehicle for resolving this critical (padlock penalty) issue."[2/]

See petition at page 53 and footnote 3, page 54. In support of this conclusion, the Petition cites a number of cases involving the public nuisance approach to obscenity, which have appeared on this Court's docket in past terms,

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2. The Alabama Supreme Court has ruled that the State Statute applies to the specific type of lewd conduct placed in evidence at the trial. The State Legislature has expressed its intention that where the statute does apply, a one year padlock penalty must be assessed against the leasehold, and has authorized repossession of the leasehold if specific redemption procedures are followed. The federal issues are: (1) has the Alabama State Legislature violated any first amendment "Prior Restraint" principles heretofore expressed by this Court and (2) has the Alabama State Legislation exceeded its governmental powers under the Tenth Amendment of the Bill of Rights?

(Petition, pages 21-27) and thereafter states at page 26:

> "A review of the files in the above appeals will demonstrate that, in none of these cases, has the critical 'padlock' issue of the Red Light Abatement Act been drawn as clearly in focus. With the single exception of the constitutional issue as to whether the 'padlock' penalty constitutes a 'prior restraint' in violation of the First Amendment, the decision of the Alabama Supreme Court below upheld the petitioner's claims on all of the trial issues involving the Red Light Abatement Act, including those State issues involving statutory construction."

In its Brief in Opposition, Respondent disputes Petitioner's claim that the "padlock" penalty is the only issue, and argues at page 8:

> "The Alabama Red Light Abatement Statute raises a number of issues and would not allow the critical padlock issue only to be decided by this Court...";

and at page 9:

> "Respondent contends that the consideration by the Court of the Alabama Red Light Abatement Statute would not be limited to one critical padlock issue.

BLEED

> If the Court considered this statute, it should consider its various provisions as well as its applicability to motion pictures at all... Among these issues would be the following..."

Thereafter, Respondent catalogues, at pages 9 and 10, six additional questions, which Respondent contends are "Substantial Federal Questions" to be considered on this appeal.

In reply, Petitioner submits that the above stated claims of the Respondent have already been rejected by this Court's decision in Art Theater Guild, Inc. et al. v. Clark L. Ewing, ___U.S.___ 44 L.Ed.2d 82, ___S.Ct.___ (April 21, 1975), appeal dismissed for want of a substantial federal question. All of the Respondent's claims were raised and rejected by the pronouncement of this Court in the Art Theater Guild case. The Alabama Red Light Abatement Act is virtually identical to the Ohio Red Light Abatement Act which was considered in that case.

In Hicks v. Miranda, __ U.S.__, 45 L.Ed.2d 223, 95 S.Ct. __ (June 24, 1975) this Court resolved a longstanding dispute as to the significance of its dismissal "for want of a substantial federal question," at page 236:

> "We agree with appellants that the District Court was in error in holding that it could disregard the decision in Miller

II. That case was an appeal from a decision by a state court upholding a state statute against federal constitutional attack. A federal constitutional issue was properly presented, it was within our appellate jurisdiction under s1257(2), and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction. We were not obligated to grant the case plenary consideration, and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one. The three-judge court was not free to disregard this pronouncement. As Mr. Justice Brennan once observed '(v)otes to affirm summarily and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. . . .' Ohio ex rel. Eaton v. Price, 360 U.S. 246, 247, 3 L.Ed.2d 1200, 79 S.Ct. 978 (1959); compare Stern & Gressman, Supreme Court Practice, Fourth Ed, p. 197 ("The Court is, however, deciding a case on the merits,

when it dismisses for want of a substantial question..."); Wright, Law of Federal Courts, 2d Ed, p.495 ("Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits.") The District Court should have followed the Second Circuit's advice, first in Port Authority Bondholders Protective Committee v. Port of New York Authority, 387 F.2d 259, 262 n 3(1967), that 'unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial it remains so except when doctrinal developments indicate otherwise'; and later in Doe v. Hodgson, 478 F.2d 537, 539 (1973), cert denied, 414 U.S. 1096, 38 L.Ed.2d 555, 94 S.Ct. 732 (1974), the lower courts are bound by summary decisions by this Court 'until such time as the Court informs (them) that (they) are not.' "

In Hicks, this Court noted, at page 236, footnote 14, that when a claim is made that a summary dismissal of a previous appeal is dispositive of the constitutional issue presented in such appeal, the initial task is to ascertain what

issues had been properly presented in such appeal and declared to be without substance. See also Colorado Springs Amusement Ltd. v. Rizzo, 524 F.2d 571 at 575-577 (Oct. 16, 1975). The Jurisdictional Statement in Art Theater Guild Inc. et al. v. Ohio ex rel. Clark L. Ewing, No. 73-1973 listed 13 alleged defects. A copy of pages 1-32 of Appellee's Motion to Affirm in that case, setting forth arguments responding to those 13 alleged defects, is attached to this brief as Appendix A1-32.

It must further be observed that General Corporation has not seen fit to petition this Court for a review of those constitutional issues which were decided against General Corporation in the Alabama Supreme Court. Were this Court not to grant a review in this Petition, General Corporation should not thereafter be permitted to seek review of the federal issues which were decided by the Alabama Supreme Court adverse to their interests---particularly those which were decided in Art Theater Guild Inc., supra, since it has not seen fit to affirmatively seek relief in this Court from those rulings.

The answer to Respondent's suggestion at page 7 of the Brief in Opposition that:

> "a more likely candidate for consideration by this Court dealing with the applicability

> of a nuisance statute made specifically applicable to motion picture theaters is a decision of a three-judge court in Texas in Universal Amusement Co. Inc. v. Vance, 404 F.Supp. 33 (July 1975)"

can be found in a casual reading of the three-judge court opinion, and the statement of facts in the Jurisdictional Statement in Ted Butler and Emil Peters et al. vs. Richard C. Dexter, No. 75-623, one of the many appellate attacks on that three-judge court decision. There may be less complex federal cases in the nuisance area than Butler v. Dexter, supra, but this Petitioner knows of none. The probability of getting to the padlock penalty issue in the Universal Amusement Co., Inc. appeal is even more remote that that which was presented on the appeal in Huffman et al. v. Pursue Ltd., ___U.S.___ 43 L.Ed.2d 482, ___S.Ct.___ (Mar. 18, 1975). (See, in this regard, the Petition for Writ of Certiorari, herein, at page 54, footnote 3).

IV

THE RECENT DECISION OF THE CALIFORNIA SUPREME COURT UPHOLDING THE APPLICATION OF THE CALIFORNIA PUBLIC NUISANCE LAWS TO OBSCENITY, BUT DEFERRING TO THIS COURT ON THE QUESTIONS OF THE PADLOCK PENALTY AND AN INJUNCTION AGAINST FUTURE EXHIBITIONS, UNDERSCORES THE SUBSTANTIAL NATURE OF THIS FEDERAL QUESTION.

In the Petition for a Writ, Petitioner presented the following argument at page 26:

> "The merits of the public nuisance approach, and the critical question as to whether or not the 'padlock' penalty of the Red Light Abatement Act is in derogation of federal rights, are 'burning' issues in a number of other states. See Busch et al. v. Projection Room Theater et al., 118 Cal.Rptr. 428 (Dec. 27, 1974) hearing granted on March 10, 1975 in L.A. No. 30518 and argued to the California Supreme Court on June 18, 1975... A timely decision by the Court on the critical issue in this case will obviate a great deal of additional litigation on the same issue in other state and federal courts."[3/]

3. See New York v. O'Neill, 359 U.S. 1, 3 L.Ed. 2d 585, 79 S.Ct. 564 (Mar. 2, 1959) where this Court, in granting certiorari, noted at page 587:

> "The Circuit Court, ruling that the Florida statute violated the Florida and

Subsequent to the filing of the Petition, the California Supreme Court decided the Busch case, upholding the application of the California Public Nuisance Statute to obscenity (porno theater and porno book stores) People ex rel. Busch et al. v. Projection Room Theater et al., ___Cal. 3d___(Mar. 4, 1976). A copy of the Busch decision is attached to this Brief at Appendix B. Because the proceedings in Busch were at a pleading stage and the cases were being remanded for trial, the California Supreme Court, after acknowledging the fact that this Court has not yet spoken on the padlock issue, deferred on that critical issue and left the matter open for further consideration. See Appendix B, herein, at page B-25 where the California Supreme Court ruled:

"We express no opinion upon the further question whether the court may, in addition, either close the premises entirely or enjoin

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the United States Constitutions, refused to grant New York's request. 9 Fla.Supp. 153. The Supreme Court of Florida affirmed this decision on the ground that the statute violated the United States Constitution. (Fla) 100 So.2d 149. We granted certiorari, 356 U.S. 972, 2 L.Ed.2d 1146, 78 S.Ct. 1137, inasmuch as this holding brings into question the constitutionality of a statute now in force in forty-two States and the Commonwealth of Puerto Rico." (Our emphasis)

further 'obscene' exhibitions regarding materials not yet adjudged obscene. Several cases suggest that such further forms of relief would be appropriate and constitutionally permissible. (See People ex rel. Hicks v. Sarong Gals (1974) 42 Cal.App.3d 556, 562-563; Bloss v. Paris Township, supra, 157 N.W. 2d 260; Grove Press, Inc. v. Flask, supra, 326 F.Supp. 574, 578-580; Oregon Bookmark Corporation v. Schrunk (D. Ore. 1970) 321 F.Supp. 639; State ex rel. Cahalan v. Diversified Theat., supra, 299 N.W.2d 389, 396-397; United Theatres of Florida, Inc. v. State ex rel. Gerstein (Fla. Ct. App. 1972) 259 So.2d 210, 212-213, vacated and remanded, 419 U.S. 1028.) Other cases have held that such relief would constitute an invalid prior restraint of presumptively protected materials (Gulf States Theatres of Louisiana, Inc. v. Richardson (La. 1973) 287 So.2d 480, 489; Mitchem v. State ex rel. Schaub (Fla. 1971) 250 So.2d 883, 886-887; New Rivieria Arts Theatre v. State, supra, 412 S.W.2d 890, 893-895; Sanders v. State, supra, 203 S.E.2d 153, 156-157; State ex rel. Little Beaver Theatre, Inc. v. Tobin, supra, 258 So.2d 30, 32; State ex rel. Ewing v. 'Without A Stitch', supra,

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307 N.E.2d 911, 917-918.) Since the United States Supreme Court has not yet spoken on this difficult question, and since in this posture of the case the issue is not before us, we leave the question open for further consideration."

The reluctance of the majority of the California Supreme Court to hand down a ruling in this area, absent a policy decision from this Court, is but another example of a major stumbling block which is preventing local communities in Alabama, California, and elsewhere in the 50 states, from developing a "public nuisance" solution to this social problem---a compelling need of nation-wide significance. See, for example, People ex rel. Camil v. Buena Vista Cinema, petition for a writ of certiorari to the Court of Appeal, Second Appellate District, filed in this Court on Dec. 7, 1975 in No. 75-820, cert denied by this Court on March 1, 1976.4/

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4. On June 18, 1974, the Buena Vista Cinema commenced showing hard-core pornographic films ("Deep Throat" and "Devil In Miss Jones") at a shopping center in Duarte, California (Population 14,000). Under prevailing principles of constitutional law on "prior restraint", as presently interpreted by this Court, See Southeastern Promotions Ltd. v. Conrad ___U.S.___, 43 L.Ed.2d 448, 458 95 S.Ct.---(Mar. 18, 1975))

(footnote continued on next page)

CONCLUSION

The Writ of Certiorari should be granted as prayed for.

Dated: March 17, 1976

Respectfully Submitted,

James J. Clancy
Attorney for Petitioner

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the City was powerless to prevent the licensing and exhibition of such lewd films (Petition for Writ of Certiorari in People ex rel. Camil v. Superior Court and Buena Vista Cinema, No. 75-820 at "Statement of Facts" pages 5-34). As of the time of filing the Supplemental and Reply Brief herein, the Buena Vista Cinema has, in two years, exhibited 72 consecutive programs of hard-core films (approximately 144, one hour hard-core pornographic films) and is presently exhibiting "Deep Throat" and "Devil In Miss Jones" as reruns. (See Los Angeles Times for Mar. 16, 1976 at Adult Movie Advertisement on page 8). Multiply this example by ten thousand, and the importance of this "Federal Question" begins to take shape and come into proper focus.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March 1976, copies of the within Reply and Supplemental Brief were mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

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APPENDIX A

Pages 1 - 32 of Appellee's Motion To Affirm on File in this Court in Art Theater Guild, Inc., et al. v. Ohio ex rel. Clark L. Ewing, No. 73-1973. See Art Theater Guild, Inc. et al. v. Ohio ex rel. Clark L. Ewing, ___, U.S. ___, 44 L.Ed.2d 82, ___ S.Ct. ___, (April 21, 1975) appeal dismissed for want of a substantial federal question.

(See page 10 herein) . . . . . A-1 to A-32

Supreme Court of the United States

No. 73-1973

October Term, 1974

ART THEATER GUILD, INC., *et al.*,
Appellants,

vs.

STATE OF OHIO *ex rel.*, CLARK L. EWING,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO AFFIRM

The Appellee, State of Ohio ex rel. Clark L. Ewing moves to affirm the judgment of the Supreme Court of Ohio pursuant to Rule 16(1)(c) of the United States Supreme Court.

That the public nuisance laws may be used to abate the public exhibition of an obscene motion picture film has already been decided by this Court in a series of obscenity cases on review from the state of Georgia. See Evans Theatre Corp. et al. v. Slaton, District Attorney of Fulton County, 227 Ga. 377, 180 S. E. 2d

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712 at 716 (Mar. 4, 1971) wherein the Georgia Supreme Court upheld a civil injunctive action as to the film "I Am Curious (Yellow)" on "public nuisance" grounds. Cert. denied in Evans Theatre Corp. et al. v. Slaton, District Attorney of Georgia, 404 U.S. 950, 30 L.Ed.2d 267, 92 S. Ct. 281 (Nov. 9, 1971). The Evans Theatre Corp., supra, abatement procedure was followed in Slaton v. Paris Adult Theatre I, 185 S. E.2d 768 at 768 (Nov. 5, 1971) and approved by this Court in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 37 L.Ed.2d 446 at 455, 93 S.Ct. 2628 (June 21, 1973). See, also, Slaton v. Paris Adult Theatre I, 201 S.E.2d 456 (Oct. 30, 1973), cert. denied in Paris Adult Theatre I v. Slaton, ___U.S. ___, 41 L.Ed.2d 1173, ___S.Ct. ___ (July 25, 1974).

The views of this Court on the seizure of obscene materials as contraband and their forfeiture as such are clearly stated in U.S. v. Reidel, 402 U.S. 351, 28 L.Ed.2d 813, 91 S.Ct. 1410 (May 3, 1971), U.S. v. Thirty Seven (37) Photographs, 402 U.S. 363, 28 L.Ed.2d 822, 91 S.Ct. 1400 (May 3, 1971). See, also, Kingsley Book Inc. v. Brown, 354 U.S. 436, 441 1 L. Ed.2d 1469, 77 S.Ct. 1325 (June 24, 1957). The power to declare forfeitures as to the instrumentalities of the crime has been fully litigated

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in a series of cases recently decided by this Court. U.S. v. U.S. Coin and Currency, 401 U.S. 715, 28 L.Ed.2d 434, 91 S.Ct. 1041 (Apr. 5, 1971), One Lot of Emerald Cut Stones and One Ring v. U.S., 409 U.S. 232, 34 L.Ed.2d 438, 92 S.Ct. 489 (Dec. 11, 1972), Astol Calero-Toledo v. Pearson Yacht Leasing Co., ___U.S. ___, 40 L.Ed.2d 452, ___S.Ct. ___ (May 15, 1974).

Statement of the Case.

The film "Without A Stitch" opened at the Appellant Westwood Art Theater in Toledo, Lucas County, Ohio, on July 17, 1970.

Appellant Westwood Art Theater is operated by Appellant Art Theatre Guild, Inc., an Ohio Corporation, under a lease from the owner of the premises. Appellant Art Theatre Guild, Inc. (wholly owned by Louis K. Sher, a California resident) has a wholly owned subsidiary (Sherpix, Inc., an Ohio Corporation) which, in turn, owns the right to 50% of the proceeds received from the exhibitions of the film "Without A Stitch" in the State of Ohio and throughout the United States. Appellant Tonylyn Productions, Inc. owns the remainder of the rights for exhibitions in the United States (Jurisdictional Statement at page 52.)

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On August 10, 1970, Appellee Clark Ewing, a private citizen residing in Lucas County, Ohio, brought this action in the Court of Common Pleas of Lucas County, Ohio, in the name of the State of Ohio, under the authority of Section 3767. 01, et seq., of the Ohio Revised Code, for the purpose of securing a temporary and permanent injunction to prevent the exhibition of the picture "Without A Stitch" in the State of Ohio, and for an accounting of the box office receipts, which he prayed be forfeited to the State of Ohio, all on the theory that the film constituted a public nuisance, as defined by O. R. C. Section 3767. 01, et seq.

Under Ohio precedure, the defendant in such matters has the option of consolidating the hearing on the temporary injunction with the trial on the merits for the final injunction. The hearing for a temporary injunction was consolidated with the hearing on the merits which came on for trial commencing on Aug. 25, 1970.

The film is in Danish with English subtitles and lasts 96 minutes. See Continuity for "Without A Stitch" at Appendix A and B to this Motion to Dismiss. The Westwood Art Theater followed the instructions of the distributor that no persons under 18 were to be admitted. The theater is a closed, or "hard top" theater, not a

drive-in.

The trial was conducted without a jury. The judge viewed the film. The appellee testified and also called as a witness Dr. Anders Otterland, a medical school professor, who testified that the dominant theme of the movie was to exhibit different forms of sexual deviation, variations, variances (Transcript, vol. IV, p. 84); that the film had no social value (p. 90); that the depiction of the doctor's role in the movie was utterly unrealistic (p. 94); and that the doctor in the movie was "committing an ethical crime"(p. 94); that he "couldn't think of any doctor that would teach a young girl in his office to make sexual intercourse" and that it was "utterly unrealistic"(p. 96); that, based upon his experience as a doctor in the sex education bureau, the progression which the girl goes through and her reactions to them was not realistic (p. 96); that the film was not a true depiction of the nature of female sexuality (p. 97); and that such an incorrect description of female sexuality has a corruptive effect on society as a whole. (p. 97)

A continuity of the film "Without A Stitch", attached as Exhibit "C" to the complaint, was admitted into evidence as plaintiff's exhibit 4 (Transcript, vol. IV, p. 99). The continuity of the film "Without A Stitch" appears herein at Appendix "A".

Appellants called three witnesses, Dr.

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Frank A. Hoffman, an alleged expert on erotic art and folklore; Louis M. Pesce, former New York state film censor, and presently advisor to the film industry; and Dr. Michael Greicus, an English professor.

On September 16, 1970, the Court of Common Pleas found the film to be obscene and filed 14 findings of fact and 11 conclusions of law (Jurisdictional Statement at pages A51-57.) The order entered by the trial court reads as follows (Jurisdictional Statement at page A58):

COURT ORDER

> The Court, therefore, finds that the Plaintiff is entitled to an order permanently enjoining the Defendants, each and all of them and all persons acting by, through, under, or in concert with them, from exhibiting the motion picture film entitled "Without A Stitch" in the State of Ohio. And said permanent injunction is to issue and become effective three days from the date of the filing of this order unless the defendants jointly or any one of them, deposit an appeal bond in the amount of $20,000.00 to stay execution until final adjudication in the Appellate Courts of this State.
>
> The question of forfeiture as prayed for in the petition is stayed, pending final adjudication.
>
> That the Defendants are to pay the costs herein.
>
> NICHOLAS J. WALINSKI, Judge

Appellants elected to continue exhibiting the film at the Westwood Art Theater and deposited an appeal bond in the amount of $20,000.00 to stay execution.

An appeal on law and fact was taken to the Lucas County Court of Appeals from the trial court's judgment. Under the now abandoned Ohio practice, such an appeal could be taken in certain classes of cases, and the appeals court heard the case de novo on the record below and on additional evidence. The only additional evidence heard went to establish the procedure for barring juveniles from the theater during the run of this picture.

The Court of Appeals made its own findings of fact and concluded, in its opinion (Jurisdictional Statement at pages 31-48) that the film was obscene and should be permanently enjoined from exhibition in the State of Ohio. In addition, the Court of Appeals held that all of the remedies contained in Chapter 3767 of the Revised Code were mandatory and accordingly ordered the theater closed for a year, assessed a Three Hundred ($300.00) Dollar tax and ordered an accounting of the box office receipts from the date of the final order of the Court of Common Pleas through the final performance. One of the three judges of the Court of Appeals concurred on the granting of the permanent injunction and the

other relief, but dissented from that part of the judgment which ordered an accounting of the box office receipts.

An appeal was then taken to the Ohio Supreme Court. That Court agreed to hear the case but limited its review to questions concerning the Ohio Nuisance Statute. The Ohio Supreme Court refused to review the question of the obscenity of the film.

On February 27, 1974, the Ohio Supreme Court announced its decision, reported at 37 Ohio St. 2d 95 sub. nom. State ex rel. Ewing v. Without A Stitch. In its decision, the Ohio Supreme Court modified the judgment of the Court of Appeals in that it permitted an accounting of net profits only from the time of the original injunction. It held that the statute did not permit forfeiture of box office receipts. It further held that although the theater could be closed for a year, the theater could remain open if the owner of the real estate proved to the satisfaction of the Court his good faith and complied with the release provisions of R. C. 3767. 04. In this regard, the Ohio Supreme Court stated (Jurisdictional Statement at page A11):

> "The fourth remedy is also contained in R. C. 3767. 06. One part of the statute dictates that the abatement order include an order closing the place, in and upon which the nuisance was maintained,

for a period of one year. R.C. 3767.06 states that the closing pertains to the use of the property "for any purpose." However, this harsh penalty is ameliorated by permitting the owner to obtain a release from the order by complying with the release provisions of R.C. 3767.04. Those provisions require that the closing order must be released if the owner appears in court, pays the costs incurred in the action, files a bond in the full value of the property, and demonstrates to the court that he will prevent the nuisance from being reestablished."

ARGUMENT.

I.

The Ohio Nuisance Statute (R.C. Section 3767.01 et seq.), as Applied by the Ohio Courts to the Trial Facts Herein, Is a Constitutionally Permissible Means of Controlling Obscenity.

In their attack on the Ohio Nuisance Statutory scheme, as interpreted by the highest court in the State of Ohio, Appellants list thirteen alleged defects of constitutional dimension, five of which were not considered by the Ohio Supreme Court in its opinion, and are unrelated to the facts on appeal herein. (See second, fifth, tenth, twelfth, and thirteenth grounds appearing at pages 8, 9, 11, and 12 of the Jurisdictional Statement.) Appellee submits that under rudimentary principles of constitutional law the latter five claims are not properly before this court. Appellants are limited in their attack on the constitutionality of the statute to the specific manner in which the statute was applied in this case. They cannot complain that in the future other sections may be unconstitutionally applied to others: See United States v. Raines, 364 U. S. 17, 21 (1960):

> "Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to

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other persons or other situations in which its application might be unconstitutional."

The reasonableness of the above-limiting rule of constitutional law is evident when one considers Appellants' second alleged defect which reads as follows:

> Second, Section 3767.01 describes only obscene films as nuisances subject to the penalties of the statute, but not books, magazines or pictures of similar character or content. Such a classification is both an arbitrary denial of substantive due process and equal protection of the laws guaranteed by the Fourteenth Amendment. See Yick Wo v. Hopkins, 118 U.S. 356 (1886)."

The impropriety of considering the issue of arbitrary classification, based upon an assumption that "books, magazines or pictures of similar character or content" are not subject to the penalties of the statute, is apparent when one considers that said statute has already been given a contrary interpretation by the Ohio trial courts (that is, to subject such subject matter to the statute) and, less than five months ago, such interpretation was sustained by a three-judge federal district court in Cincinnati. See Cincinnati Properties Inc. et al. v. Simon Leis et al., Civil Action No. 8471, In the United States District Court for The Southern District of Ohio,

Western Division, decided May 2, 1974, a copy of which appears herein at Appendix "C".

A. FIRST ALLEGED DEFECT.

The first alleged defect, based upon overbreadth, is answered by the Ohio Supreme Court in its opinion below. See State ex rel. Ewing v. A Motion Picture Film Entitled "Without A Stitch" et al., 37 Ohio St. 2d 95, 307 N. E. 2d 911 at 914:

> "First, appellants allege that the definition of nuisance contained in R. C. 3767. 01(C) is overbroad. In essence, the statute states that any place which exhibits filmed obscenity is a nuisance, and this court has held that only activity which violates R. C. 2905. 34 and R. C. 2905. 35 constitutes a "nuisance" within the meaning of R. C. 3767. 01(C). State ex rel. Keating v. Vixen, supra, (27 Ohio St. 2d 278, 272 N. E. 2d. 137). Upon remand of the Vixen case from the United States Supreme Court, this court also held (35 Ohio St. 2d 215, 301 N. E. 2d 880) that the definition of obscene material contained in R. C. 2905. 34 comports with the constitutional definition of the word "obscenity" as enunciated in Miller v. California (1973), 413 U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419. Since an obscenity-nuisance abatement action under R. C. 3767. 01 et seq. is limited to the exhibition of obscene material as defined in R. C. 2905. 34, and since R. C. 2905. 34 is not overbroad, if follows that the definition of nuisance contained in R. C. 3767. 01(C) is not overbroad."

Appellant's claim of overbreadth is "old hat" to obscenity litigation involving obscenity statutes which employ "specificity". See the trial court's decision in Adams Newark Theatre Co. v. Newark, 120 A.2d 496 at 499 (Feb. 7, 1956) which upheld appellants' contention herein, but which, in turn, was unanimously reversed by the New Jersey Supreme Court in Adams Newark Theatre Co. v. Newark, 126 A.2d 340 with that Court remarking at page 343:

> "The municipality is thus faced with a constant dilemma. If it employs broad language, such as 'lewd, obscene or indecent,' the defense contends the accusation is so vague and general as not to apprise the defendants of the particular case to be met. While, if the information which would undoubtedly be demanded under those circumstances is put into the ordinance itself for clarification, it is said to become a trespass upon the constitutional protection of free speech."

It should be of particular interest to this Court that, on the same date that it upheld Roth-Alberts 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957) the Roth-Alberts Court also affirmed the judgment of the New Jersey Supreme Court in a 5-3 per curiam opinion in Adams Newark Theatre Co. v. Newark, 354 U.S. 931, 1 L.Ed.2d 1533, 77 S.Ct. 1395 (June 24, 1957).

Appellants claim that language appearing

in R. C. Sections 2907. 01(F)(2) and 2907. 01(F)(5) is vague, namely "in a way which tends to represent human beings as mere objects of sexual appetite" and appeal to prurient interest "for its own sake" for "commercial exploitation" rather than for a "genuine . . . moral . . . purpose" must fail for the same reason.

B. THIRD ALLEGED DEFECT.

The third alleged defect (Jurisdictional Statement at page 8) which attacks the trial court's power, sitting as an Equity Court, to issue a temporary injunction upon a standard of proof "to the satisfaction of the court or judge" was not properly raised in the state court. See Whitney v. California, 274 U.S. 357, 362-363; Supreme Court Practice by Stern and Gressman, Fourth Edition at page 131. No mention was made of it in either the trial court, the Court of Appeal, or the Supreme Court of Ohio and that issue is not properly before the Court in this Appeal.

Appellants' assertion under their third claim that a temporary injunction can be issued under the statute "without hearing evidence" is contradicted by the plain language of the statute and the ruling of the Ohio Supreme Court. See State ex rel. Ewing v. "Without A Stitch", supra,

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at page 914:

> "Under R. C. 3767. 01 et seq., the earliest point in time when the exhibition of a film may be enjoined is upon the granting of a temporary injunction. However, a temporary injunction can only be issued after a judicial hearing at which all the parties can present evidence on the allegation of obscenity." (our emphasis)

The ex parte restraining order authorized by R. C. Section 3767. 04:

> "restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon . . . ."

is not an injunction against exhibition. Rather, it is an exercise of the subpoena power of the court. See Grove Press, Inc. v. Flask, 326 F. Supp. 574, at 579; Walter v. Slaton, 182 S. E. 2d 464, 467 (May 13, 1971); Go v. Peterson, 480 P. 2d 35, at 36 (Feb. 1, 1971); and U. S. v. Little Beaver Theatre, Inc., 324 F. Supp. 120, 121 (Jan. 15, 1971). In any event, such ex parte restraining order was not issued by the trial court below, and such matter is not properly before this Court. United States v. Raines, supra.

The assertion under the third claim (Jurisdictional Statement at page 8) that "serious issues of prior restraint and inhibition of distribution of protected materials are presented by the interlocutory powers given the trial court by this statute" are completely without merit. See U. S. v. 37 Photographs, 402 U. S. 363, 91 S. Ct. 1400, 28 L. Ed. 2d 822, at pages 830-833 (May 3, 1971), which authorizes actual prior restraints for a reasonable period of time in advance of a final determination of the obscenity issue by the trial court (not in issue here) in Federal Customs cases.

That the judicial restraint may be applied after an adversary hearing at the preliminary injunction stage does not raise any additional procedural issues for, as authorized by Civil Rule 65(B)(2), the Court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. The defendant in such matters has the option of consolidating the hearing on the temporary injunction with the trial on the merits for the final injunction, and such did occur in the trial court below: See Ohio ex rel. Ewing v. "Without A Stitch", supra, at page 914:

> "R. C. 3767. 04 provides for the filing and disposition of an application for a

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> temporary injunction. The appellee did file such an application in this case. R. C. 3767. 04 also requires that the application for a temporary injunction be heard within ten days of filing, and that all defendants be served with the complaint and notice of the time and place of hearing on the application for a temporary injunction at least five days before the hearing. In the present case, the application for a temporary injunction was filed on August 10, 1970, and a hearing was scheduled for August 19, 1970. However, on the hearing date the court continued the hearing until August 25, 1970, and consolidated that hearing with a hearing on the merits of issuing a permanent injunction."

The Ohio procedures are well within the boundaries set by this Court in U.S. v. 37 Photographs, supra. See Ohio ex rel. Ewing v. "Without A Stitch", supra, at page 914, where the Ohio Supreme Court noted:

> "R. C. 3767. 05 provides that a nuisance abatement action "shall have precedence over all other cases except crimes, election contests, or injunctions." In this case, a three-day hearing, commencing August 25, 1970, was held. It resulted in the issuance of a permanent injunctive order on September 16, 1970. The application for the temporary injunction was dismissed.
>
> At this point, it should be noted that R. C. 3767. 01 et seq., do not provide for or allow censorship of films prior to a judicial determination of obscenity. Therefore, the United States Supreme Court decisions, such as Freedman v. Maryland,

(1965), 380 U.S. 51, 85 S.Ct. 734, 13 L. Ed. 2d 649, and Teitel Film Corp. v. Cusack (1968), 390 U.S. 139, 88 S.Ct. 754, 19 L. Ed. 2d 966, which specify the constitutional requirements of such a system, are not applicable."

C. FOURTH ALLEGED DEFECT.

The fourth alleged defect (Jurisdictional Statement at page 8) which suggests that, under the statute, an owner of the premises may be penalized "without proof of his guilty knowledge" and that there is a "shifting of the burden of proof of scienter" from the complaining party to the real estate owner is contradicted by the opinion of the Ohio Supreme Court. See Ohio ex rel. Ewing v. "Without A Stitch" at page 916; where the court stated that no individual could be penalized under the statute unless it was shown that such person had knowledge of the content of the film declared to be obscene:

> "The exhibition of films is an activity normally protected by the First and Fourteenth Amendments. Kingsley International Picture Corp. v. Regents (1959), 360 U.S. 684, 79 S.Ct. 1362, 3 L. Ed. 2d 1512. R.C. 3767.01 et seq. penalize persons engaged in the exhibition of obscene films in that R.C. 3767.06 requires that all personal property used in conducting the nuisance be sold and R.C. 3767.08 imposes a tax of three hundred dollars upon persons maintaining the nuisance and upon the theater and the real property on which

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it is located. Therefore, those penalty provisions can be imposed only if the persons upon whom they are sought to be imposed had knowledge of the content of the film declared to be obscene.

This requirement of scienter is not novel. In State ex rel. Keating v. Vixen, supra (27 Ohio St. 2d 278, 285, 272 N.E. 2d 137), this court held that a film constitutes a nuisance which can be enjoined pursuant to R.C. 3767.01 et seq. only if scenes in the film violate R.C. 2905.34 and 2905.35. R.C. 2905.35 expressly requires knowledge of the contents of the film on the part of any person against whom that statute is sought to be invoked. Therefore, no individual can be penalized under R.C. 3767.01 et seq. for maintaining a theater in which an obscene film is exhibited unless it is shown that that person knew of the contents of the film. In the present case, none of the appellants contended upon appeal that he did not have knowledge of the contents of the film." (our emphasis.)

Further, the opinion of the Ohio Supreme Court made it clear that the burden of proof under the obscenity-nuisance abatement action is on the complaint. See Ohio ex rel. Ewing v. "Without A Stitch", supra, at page 916:

"Appellants' third reason for asserting that R.C. 3767.01 et seq. are unconstitutional is the allegation that those statutes place the burden of proving that a film is not obscene upon the exhibitor. It is settled that in areas generally protected by the First Amendment, the state must shoulder the burden of proving that

the particular activity complained of is outside the scope of constitutional protection. Freedman v. Maryland, supra, (380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649); Speiser v. Randall (1958), 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460. However, R.C. 3767.01 et seq. do not place the burden of proof upon the defendants in an obscenity-nuisance abatement action. Since the statutes are silent on this point, the general rule, that the burden of proof is on the complainant, is applicable."

D. SIXTH ALLEGED DEFECT.

The sixth alleged defect pertains to R.C. section 3767.06 and the procedures which govern the final hearing on the merits. Appellants note that such procedures are the same as those employed at the hearing on the temporary injunction, and that the sixth claim is a duplication of other claims previously described.

E. SEVENTH ALLEGED DEFECT

Appellants' seventh alleged defect reading:

". . .the closing of a theater for a year prevents it, during that period, from exhibiting any film, whether or not sexually oriented, whether or not protected by the First Amendment and whether or not previously adjudged to be obscene in a court of law. That such a result, after the adjudication of obscenity of one film, under the questionable standards and procedures provided by this statute, raises implications. of prior restraint of the most serious kind."

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is the same argument which was successfully urged upon the three-judge federal district court in Pursue Ltd. v. Huffman et al., as to which jurisdiction was noted by this Court in Huffman et al. v. Pursue Ltd., No. 73-296, ___U. S. ___, 39 L. Ed. 2d 870, ___S. Ct. ___ (Mar. 18, 1974). In that case, the federal district court enjoined the enforcement of a Lima, Ohio Common Pleas Court judgment which had padlocked a theater based upon a course of conduct involving the exhibition of 16 obscene motion picture films over a period of several months. Appellants herein filed a copy of said opinion of the three-judge federal district court in Pursue Ltd. v. Huffman et al., supra, with the Ohio Supreme Court, well in advance of its decision herein. In holding as it did in this case, the Ohio Supreme Court must be understood to have rejected the reasoning upon which the Pursue Ltd. decision was based.

Two months after the decision of the Ohio Supreme Court herein, the United States District Court for the Southern District of Ohio, Western Division, handed down an opinion wherein it considered the same issue, applied a different analysis, and came to a conclusion different from that of the three-judge federal district court in Pursue Ltd. v. Huffman, supra.

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In Cincinnati Properties Inc. v. Simon Leis, (See copy of opinion at Appendix "C" at pages C-8 to C-11) the three-judge court (Peck, Porter, and Hogan) stated:

> "The plaintiffs' constitutional argument is this: A person is operating a book store containing a thousand different items each concededly presumptively protected by the First Amendment - a fair sampling of the 1,000 produces 50 which are subsequently the subject of an adversary judicial proceeding and found to be obscene. Any state remedy applied to the facts which prevents the operator from staying in business at that location and selling the other non-judicially examined materials is a prior restraint on the sale of those materials and therefore violates the First Amendment. We do not agree. The argument overlooks the right of the State, within constitutional bounds, to declare or define public nuisances and abate them. . . . The falacy of the plaintiffs' position is somewhat indicated by this simple example: A person possessing for sale one copy of one book concededly obscene and ten copies of a concededly non-obscene book is imprisoned for the former - during the term of imprisonment he is effectively stopped from dealing in non-obscene materials. Surely it would not follow that the imprisonment was unconstitutional because it was a prior restraint respecting the innocent materials.
>
> "From time immemorial states have chosen, in the exercise of their police power, to define certain action as illegal and, in addition, to define the place where certain prohibited activity is carried on as a

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"nuisance". The attendant remedy provided in such nuisance cases has been one against the place in which the activity has been carried on. This record is clear that the business of selling books and materials and offering shows was being carried on in the involved locations (see, for instance, the hundreds of publications contained in the "Inventory" involved in No. 8714 (copy of the state court record attached to defendant Conroy's motion for summary judgment.)) No one questions that the sampling was a fair one and that sampling produced what is 100%, on this record, illegal and unprotected obscenity.

"The State of Ohio has seen fit to define as a nuisance, subject to abatement, a place in which obscenity is conducted. There being no question of fact that a business of obscenity was carried on, the question in this case is, therefore, really whether the State may validly define the operation in the place as a nuisance and close it for a year - padlock it - on that basis. If it can, there is no prior restraint of the non-judicially-viewed material, except purely incidental . . . .

"The constitutional power of the State to abate what has been appropriately defined as a public "nuisance" has never been seriously questioned. "Padlock" remedies have been consistently provided for by most states in the areas of prostitution, gambling, and liquor violations. It is not for us to conclude that one or the other of these subjects vis-a-vis the State's padlock power should be classed differently than obscenity. Each is a proper object of the police power and not unrelated . . . .

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"Mugler v. Kansas, 123 U.S. 623 (1887) involved Kansas' first prohibition laws and, among others, a section providing, 'All places where intoxicating liquors are . . . . sold . . . . are declared to be common nuisances and upon the judgment of any court . . . . finding such place to be a nuisance under this section, the sheriff . . . . shall be directed to shut up and abate such place . . . . ' The place involved had been the subject of liquor sales. The Court, in upholding the constitutionality, said:

> 'The State, having authority to prohibit the . . . . sale of intoxicating liquors. . . . we do not doubt her power to declare any place kept and maintained for the illegal manufacture and sale of such, shall be deemed a common nuisance and to be abated, and, at the same time, to provide for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes . . . The statute does not put the brand of a common nuisance upon any place, unless . . . . that place is kept and maintained for purposes declared by the legislature to be injurious to the community.' (Underscoring ours.)

"The padlocking provision of the Ohio statute is a time honored remedy involving the place - it is not censorship or prior restraint."

F. EIGHTH ALLEGED DEFECT.

Appellants' eighth claim notes that, while the option of the owner of the premises under

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R. C. section 3767. 06 may ameliorate the harshness of the penalty of closure as to him, "it does nothing to save the tenant in possession or operator of the theater, neither of whom have any such correlative statutory right. . . ." While that is true, the theater operator is not without his own option under the terms of the statute.

R. C. section 3767. 04 provides an exhibitor with the simple defense of confession and avoidance. Under section 3767. 04 the trial judge is required to issue the temporary injunction "If upon hearing the allegations of the petition are sustained to the satisfaction of the court or judge." The trial judge, however, is not mandated to padlock the premises if the "person owning, in control, or in charge of the nuisance so enjoined . . . shows to the satisfaction of the court or judge that the nuisance complained of is abated." Where, for example, the public nuisance was found to exist solely on the basis of one film and such showing was not representative of the course of conduct normally experienced, then it may be unreasonable to hold that a public nuisance exists if, at the time of the trial judge's finding and the preliminary injunction, the film is not showing as the result of having been "pulled" by a responsible exhibitor. See Brief for Appellants in Huffman et al. v.

Pursue Ltd., No. 73-296 at pp. 84-89.

There is no reason for this Court to believe that a good faith execution of that option on the part of the theater operator will not be recognized by an Ohio Equity Court. That matter, however, is not before the Court on this appeal, inasmuch as the Appellant theater operator did not exercise its option and, instead, elected to continue maintaining the nuisance (showing the film) notwithstanding the adverse decision by the trial court.

Appellants' further claim in their Jurisdictional Statement at pages 10-11 that "neither does it alleviate the problem of compelling the owner to come forward and disprove affirmatively what the complainant was never required to prove under the statute to obtain the closing order in the first instance." is answered herein at page 20 wherein Appellee replies to a similar contention made under the Fourth Alleged Defect. The burden of proof is on the complainant.

G. NINTH ALLEGED DEFECT.

A fair reading of the Ohio Supreme Court opinion in Ohio ex rel. Ewing v. "Without A Stitch", supra, at page 916 does not support Appellants' claim that the Supreme Court did not construe the nuisance statute to avoid overbreadth"

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(which, it is claimed, would result if both private possession and public dissemination of obscene materials were included within the ambit of the statute). At the very least, the Ohio Supreme Court's statement reading: "Therefore, Stanley v. Georgia is not applicable to the exhibition of obscenity by a theater open to the public" recognizes that governmental sanctions against the private possession of obscenity is forbidden. Such statement is susceptible to one of two interpretations: either 1) that Stanley v. Georgia is not applicable because private possession is not within the ambit of the statute, or 2) that Stanley v. Georgia is not in point because the case on appeal (i.e. the statute as applied) deals with public exhibitions, and the "consenting adult" theory did not bring the matter within the exception as to private possession.

Further, in framing the above issue for the consideration of the Ohio Supreme Court below, Appellants did not raise the question properly. Whitney v. California, 274 U.S. 357, 71 L.Ed.1045, 47 S.Ct. 641. The issue was not stated as being one of "overbreadth". See Brief for Appellants in State of Ohio ex rel. Ewing v. "Without A Stitch", In the Supreme Court of Ohio, No. 71-649, at page 20. The question which was raised by Appellants in the Ohio

Supreme Court pertained to the "consenting adults" argument which, as noted by the Ohio Supreme Court opinion, was rejected in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446.

H. ELEVENTH ALLEGED DEFECT.

Appellants' claim that the statutory scheme "provides no procedural assurance of an immediate hearing after either temporary or permanent restraint, no assurance of an immediate judicial decision thereafter, and no assurance of a speedy and accelerated judicial review" is answered herein, in part, at page 17, wherein Appellee replied to a related argument made under the Third Alleged Defect.

By way of further reply, Appellee submits that the right of a state court system to impose a judicial restraint by way of preliminary injunction after a hearing on the merits, is no longer a debatable issue. The constitutional requirement for a "prompt final judicial decision" referred to by this Court in administrative prior restraint cases such as, Marcus v. Search Warrants, 367 U.S. 717, 6 L.Ed.2d 1127, 81 S.Ct. 1708 (June 19, 1961); A Quantity of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (June 22, 1964); Freedman v. Maryland,

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380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (Mar. 1, 1965); and Teitel Film Corp. v. Cusack, 390 U.S. 139, 19 L.Ed.2d 966, 88 S.Ct. 754 (Jan. 29, 1968), had reference to a speedy determination by a trial court as distinguished from a prior restraint applied in administrative proceedings.

If the language and reference of this Court in Teitel Film to "prompt final judicial decision by the trial court" was not clear (at page 969):

> ". . . the Chicago censorship procedures violate these standards in two respects. . . (2) the absence of any provision for a prompt judicial decision by the trial court violates the standard that . . . the procedure must also assure a prompt final judicial decision . . . ."(Our emphasis.)

that issue was laid to rest in Interstate Circuit Inc., v. Dallas, 390 U.S. 676, 20 L.Ed.2d 225, at 235, fn. 22, 88 S.Ct. 1298 (1968).

The Interstate Circuit decision, supra, gives a crystal clear understanding of what this Court meant in Freedman by "prompt, final judicial decision." This Court has not made an issue out of the time period which is expended in carrying out the appellate review. That was one of the issues in the Interstate Circuit case. In Interstate Circuit v. Dallas (No. 56), 390 U.S. 676, one of the questions presented in the

jurisdictional statement was:

> "1. Whether Dallas City Ordinance 11284 is unconstitutional because it does not guarantee a prompt, final judicial decision to review actions of the Dallas Motion Picture Classification Board in classifying a motion picture as 'not suitable for young persons'?" (See Brief of Appellant, Interstate Circuit, Inc., at page 3.)

In Interstate Circuit's brief on this question, (See Brief for Appellant at pp. 3, 20, and 21), the following argument was presented at page 20:

> "Applying Freedman to the Texas judicial system, Interstate believes it is absolutely necessary that the Texas Supreme Court see the picture in dispute in order to provide for a prompt, final judicial determination that the action of the censor is correct. That court must face its judicial duty to uphold constitutional guarantees.
>
> "Since Ordinance 11284 could only secure the rights of Interstate and others by the City's promise of 'best effort,' it appears that this is not enough. Lacking the power to provide for a system of prompt judicial review, the City of Dallas could only give a system of review that required 247 days for a final decision.
>
> "This case is a perfect demonstration of the importance of the requirements of the Freedman case, as set out on page 59:
>
> > 'Therefore, the procedure must also assure a prompt, final judicial decision to minimize the

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> deterrent effect of an interim and possibly erroneous denial of a license.'
>
> "Neither Texas statutes nor decisions of its appellate courts assures a prompt, final judicial decision. Judge Hughes' opinion on the first ordinance is still correct. There is no provision in the Texas statutes for prompt, judicial review in the trial and appellate courts, and experience shows that the risk of delay is built into the Texas procedure. The Texas Judicial System does not assure procedural safeguards that satisfy the requirements of Freedman . . . ."

It was in the framework of such arguments that this Court gave its reply in Interstate Circuit, supra, at page 235, fn. 22:

> "22. Appellants also assert that the city ordinance violates the teachings of Freedman v. Maryland, supra, because it does not secure prompt state appellate review. The assurance of a 'prompt final judicial decision' (380 U.S. at 59, 13 L. Ed. 2d at 655) is made here, we think, by the guarantee of a speedy determination in the trial court (in this case nine days after the Board's classification). See Teitel Film Corp. v. Cusack, 390 U.S. 139, 19 L. Ed. 2d 966, 88 S. Ct. 754 . . . ." (Our emphasis.)

II.

The Film "Without A Stitch" Is Not Protected by the First and Fourteenth Amendments.

Appellants' claim, that the film "Without

APPENDIX B

Opinion of the California Supreme Court in People ex rel. Joseph P. Busch, as District Attorney etc., et al., v. Projection Room Theater et al., ___ Cal.3d ___, decided March 4, 1976, holding that the California general public nuisance statutes (Civ. Code, §§ 3479, 3480; Pen. Code, §§ 370-371) may be employed to regulate the exhibition of obscene material to "consenting adults"; but deferring to this Court on the federal questions of the padlock penalty and an injunction against future exhibitions.

(See page 13, herein). . . . . B-1 to B-60

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SUPREME COURT
FILED
Mar. 4, 1976
G.E. Bishel, Clerk

C O P Y

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE ex rel. JOSEPH P. BUSCH, as District Attorney, etc., et al., Plaintiffs and Appellants, vs. PROJECTION ROOM THEATER et al., Defendants and Respondents. (And 4 other cases.)+	L.A. 30432 to L.A. 30436 (inclusive) (Super. Ct. No. C56568)

In these consolidated cases we consider whether or not a civil action brought by law enforcement officers to restrain the exhibition of obscene books and films states a cause of action for relief under the public nuisance laws of this state. Plaintiffs, who are law enforcement officers acting on behalf of both the City

*These cases were previously entitled Busch v. Projection Room Theater, etc.

+ People ex rel. Busch v. Stan's Books (L.A. No. 30433); People ex rel. Busch v. Book Bin (L.A. No. 30434); People ex rel. Busch v. Jason's Books (L.A. No. 30435); People ex rel. Busch v. Galaxy Book Store (L.A. No. 30436).

"SEE DISSENTING OPINION"

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SUPREME COURT
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C O P Y

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"SEE DISSENTING OPINION"

and the County of Los Angeles, seek injunctive and other relief against defendants who, according to the five separate complaints filed herein, operate book stores or motion picture theaters in Los Angeles which exhibit magazines or films that are obscene under the laws of this state. While the five complaints are directed at different defendants and vary somewhat in the specifics of their allegations, the causes of action alleged in each are sufficiently similar in the facts alleged and in the charging allegations to permit us to consider them together.

For convenience we examine the pleadings in the case involving Projection Room Theater finding that our conclusions in that action are dispositive of the issues raised in all of the actions. Plaintiffs assert that defendants' operations constitute public nuisances which are subject to regulation and abatement either pursuant to the general public nuisance statutes (Civ. Code, §§ 3479, 3480; Pen. Code, §§ 370, 371), or under the Red Light Abatement Law (Pen. Code, § 11225 et seq.). Defendants dispute the contention. We will conclude that although the Red Light Abatement Law was not intended to apply to the exhibition of obscene magazines or films, nevertheless the complaint herein does state a cause of action under the general public nuisance

statutes.

The complaint herein alleges the following facts: Defendants own or operate specified premises in Los Angeles County in which acts of "lewdness" are taking place, namely, the "past and continuing exhibition" of magazines and films "all of which are lewd and obscene under the laws of this State, and therefore did and do constitute a nuisance under the laws of this State. . . ." It is further alleged that the magazines and films so exhibited by defendants have, as their dominant theme, an "appeal to the prurient interest in sex," that they are "patently offensive because they affront contemporary community standards relating to the description or representation of sexual matters," and that they are "utterly without social value. . . ."

According to the complaint, the maintenance of these premises constitutes a public nuisance which will continue unless restrained and enjoined. Plaintiffs attached to the complaint numerous exhibits consisting of police reports summarizing the obscene nature of the magazines and films exhibited by defendants. The complaint sought multiple relief including: (1) preliminary injunction restraining defendants from conducting and maintaining the premises for the purposes

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described above; (2) abatement of the premises as a public nuisance under sections 11230-11231 of the Penal Code (Red Light Abatement Law); (3) permanent injunction against defendants and their agents, officers and employees from operating the premises as a public nuisance; (4) closure of the premises for one year; (5) removal and sale of the fixtures and movable property thereon used in conducting the nuisance; (6) use of the proceeds from the sale to pay fees and costs in connection with the closure; and (7) other appropriate relief.

Defendants filed general demurrers to each complaint, asserting that plaintiffs failed to state a cause of action either under the public nuisance statutes or the Red Light Abatement Law. The trial court, considering itself bound by the decision in Harmer v. Tonylyn Productions, Inc. (1972) 23 Cal.App.3d 941, sustained the demurrers without leave to amend and entered judgments of dismissal. Plaintiffs appeal.

The scope of our inquiry herein is considerably narrowed by application of the familiar rule, acknowledged by defendants, that "a general demurrer admits the truth of all material factual allegations in the complaint" (Alcorn v. Anbro Engineering, Inc. (1970) 2 Cal.3d 493, 496), and we may accordingly assume that all materials in

question, both magazines and films, are obscene within the meaning of Penal Code section 311, as alleged.

1. Public Nuisance Statutes

We first consider whether or not the allegations of the complaint, summarized above, sufficiently describe the existence of a public nuisance and note preliminarily the substantial identity of definitions appearing in Penal Code sections 370 and 371, and Civil Code sections 3479 and 3480, taken in conjunction. Section 370 of the Penal Code defines a public nuisance as "(a)nything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, . . ." (Italics added.) When analyzed, section 370 reveals the following: the proscribed act may be anything which alternatively is injurious to health or is indecent, or offensive to the senses; the results of the act must interfere with the comfortable enjoyment of life or property; and those affected by the act may be an entire neighborhood or a considerable number of persons, and as amplified by Penal Code section 371 the extent of the annoyance or damage on the affected

individuals may be unequal.

Is the exhibition of obscene magazines and films a form of activity which may be characterized as "indecent" or "offensive to the senses" interfering with the comfortable enjoyment of life of a "considerable number of persons" within the contemplation of Penal Code section 370? We conclude that such exhibitions may fairly be deemed such conduct, and we find convincing support for such conclusion from applicable cases in this and other jurisdictions.

In Weis v. Superior Court (1916) 30 Cal.App. 730, the Court of Appeal ruled that an attraction known as the "Sultan's Harem," conducted at the Panama-California International Exposition, constituted a public nuisance subject to abatement. This exhibition assertedly involved the "indecent and offensive" exposure to members of the public of the "naked persons and private parts thereof" of various female employees. Although such conduct also constituted the crime of indecent exposure (Pen. Code, § 311), nevertheless the Weis court held that "(w)here, however, the threatened acts, if committed, in addition to being an indictable offense, will constitute a public nuisance, courts of equity are vested with jurisdiction to interpose their injunctive process to prevent injury which will result from the

maintenance thereof. (Citations.)" (Weis at p. 732). Furthermore, the court, quoting from Wood on Nuisances (§ 68), stated that " 'A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or of the general good order and welfare of society, is a public nuisance. Under this head are included . . . obscene pictures, and any and all exhibitions, the natural tendency of which is to pander to vicious. . . and disorderly members of society.' " (Ibid., italics added.)

The foregoing Weis reasoning was approved by us more than 30 years ago in People v. Lim (1941) 18 Cal.2d 872, 879. Lim involved the propriety of an injunction against gambling activities on the ground that they constituted a public nuisance. We upheld in Lim the use of the public nuisance injunctive remedy against gambling activity which, it was alleged, disturbed the public peace and corrupted public morals. In Lim we carefully traced the history of public nuisance actions and noted that "The courts have . . . refused to grant injunctions on behalf of the state except where the objectionable activity can be brought within the terms of the statutory definition of public nuisance." (P. 879.) Although, as we noted, such activities as gambling

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or usury do not fit comfortably within the above quoted statutory definition of public nuisance, in Lim we acknowledged that an "indecent" exhibition such as was involved in Weis could be enjoined despite the concurrent application of the criminal statutes, since such exhibitions if determined to be indecent are expressly declared by section 370 to be public nuisances.

While carefully noting that Weis involved live dance performances, we discern no satisfactory distinction which would justify differential treatment of the pictorial representations in obscene magazines and films on the one hand, and "live" performances on the other. The presentation of either may fairly be described as "indecent" and equally injurious to public morals.

Defendants have insisted that only those activities may constitute public nuisances which are offensive to the five senses of hearing, sight, touch, smell, and taste. It is claimed that public nuisance and abuse of the five senses coextensive. Defendants in so arguing focus only upon that category of nuisances described in Penal Code section 370 and Civil Codes section 3479 as conduct which is "offensive to the senses." The contention is erroneous for such reasoning completely ignores the additional language appearing in both sections which explicitly includes

as an alternative class of public nuisance conduct "anything which is indecent." When the question is put, which of the five senses is offended by conduct that is "indecent," it becomes readily apparent both that the thesis of the argument does not fit the legislative language and that conduct offensive to a community's moral sensibilities is likewise subject to regulation under section 370. Thus, the court in Weis, supra, at page 733, unequivocally states that ". . . any act which is an offense against public decency, or any public exhibition which is offensive to the senses, whether of sight, sound, or smell, or which tends to corrupt public morals or disturb the good order and welfare of society, is a public nuisance." (Italics added.)

The trial court herein, in sustaining defendants' demurrers without leave to amend, considered itself controlled by the holding in Harmer v. Tonylyn Productions, Inc., supra, 23 Cal.App.3d 941 (hg. den.). Harmer is distinguishable, however, since it involved an action by private citizens to enjoin a particular film being shown at the premises in question. The Harmer court ruled that plaintiff had failed to allege the necessary special damages requisite to bringing a public nuisance action (see Civ. Code, § 3493) thus casting doubt upon his status as a litigant.

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In contrast, the instant action is brought by public officials acting on behalf of the public generally and proceeding under provisions (see Code Civ. Proc., § 731) which expressly confer standing upon them.

More fundamentally, however, Harmer fails properly to analyze the nature of the state's interests in regulating the exhibition of obscene matter. Harmer suggests that since "only those members of the community were exposed to the film who voluntarily chose to see it," therefore "(t)he nuisance was not one which is inflicted or imposed on the public." (Harmer at p. 943.) Such reasoning frequently advanced and variously stated, misses the point. The fact that obscene or other indecent exhibitions take place behind closed doors and are viewed only by those who choose to view them does not defeat the community's interest in regulating such exhibitions.

Substantially identical arguments were advanced and rejected by us recently in People v. Luros (1971) 4 Cal.3d 84, and by the United States Supreme Court in Paris Adult Theatre I v. Slaton (1973) 413 U.S. 49. In both Luros and Paris, the argument was made that the state had no legitimate interest in regulating the exhibition and distribution of obscene matter to consenting adults. Defendants in each case urged

that Stanley v. Georgia (1969) 394 U.S. 557, was controlling on this point. Stanley, however, held only that private possession of obscene matter cannot constitutionally be made a crime. In Luros, we carefully noted the important distinction, recognized by the federal Supreme Court in Stanley, between commercial distribution of obscenity and the private possession thereof. We concluded that ". . . in the context of public distribution of obscenity, the balance of interests upholds the constitutionality of state regulation, even though that regulation imposes some burdens upon the exercise of constitutional rights. . . . States retain broad power to regulate obscenity and regulation of the public distribution of obscenity falls well within the broad scope of that power." (4 Cal.3d at pp. 92-93.) We reaffirm the foregoing conclusion reached by us in Luros.

Similarly, Paris (decided after Harmer was filed) rejected the extension of Stanley to situations involving consenting adults. The high court specifically addressed the Harmer limitation on the scope of the public interest, and "categorically disapprove(d) the theory, . . . that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults

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only." (413 U.S. at p. 57; see also pp. 57-69.) The court noted that "(t)he States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional prohibitions. (Citations.)" (Id. at p. 57.) These "legitimate interests" include "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself. The Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene material and crime." (Fn. omitted; id. at p. 58, italics added.) Further, "(a)lthough there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature . . . could quite reasonably determine that such a connection does or might exist." (Id. at pp. 60-61.)

Following its rejection of the argument that Stanley forbids state regulation of the exhibition or distribution of obscene matter, the Paris court very significantly observed: "Commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial premises open

to the adult public falls within a State's broad power to regulate commerce and protect the public environment. The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as 'wrong' or 'sinful.' The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the States' 'right . . . to maintain a decent society.' (Citation.)" (Italics added; Paris at pp. 68-69.) Both Luros and Paris explain and confirm that the interests of those who voluntarily view and purchase obscene materials are not necessarily coextensive with the interests of the community at large.

Even more recently the United States Supreme Court has noted that a state's public nuisance action seeking to close a theater exhibiting obscene films constituted an effort "to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws." (Fn. omitted; Huffman v. Pursue, Ltd. (1975) 420 U.S. 592, 605.)

Thus, the Paris court has clearly held that

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states may constitutionally determine that public exhibition of obscene material has a tendency to injure the community or to jeopardize the maintenance of a decent society. In Luros we confirmed the validity of state regulation of the commercial distribution of obscene materials. The legislative definition of a public nuisance includes "(a)nything which is . . . indecent, or offensive to the senses, . . . so as to interfere with the comfortable enjoyment of life or property by a . . . community or neighborhood, or . . . any considerable number of persons. . . ." (Pen. Code, § 370.) California's public nuisance definition, including as it does indecency, comports fully with the state's power to regulate as recently declared both by the federal Supreme Court and by ourselves and fortifies our conclusion that public nuisance laws may properly be employed to regulate the exhibition of obscene material to "consenting adults."

Given the legitimate state interests in controlling the exhibition of obscenity, carefully outlined in Paris, it is not surprising that a wide variety of cases, both before and after Paris, have confirmed that such exhibitions constitute nuisances which properly may be abated by the courts. (Grove Press, Inc. v. Flask (D. Ohio 1970) 326 F.Supp. 574, vacated and remanded on

other grounds, 413 U.S. 902; Bloss v. Paris Township (Mich. 1968) 157 N.W.2d 260, 261; Cactus Corporation v. State ex rel. Murphy (Ariz. Ct. App. 1971) 480 P.2d 375; Evans Theater Corporation v. Slaton (Ga. 1971) 180 S.E.2d 712, cert. den. 409 U.S. 950; New Rivieria Arts Theatre v. State (Tenn. 1967) 412 S.W.2d 890, 893-895; Sanders v. State (Ga. 1974) 203 S.E.2d 153, 156-157; State ex rel. Ewing v. "Without A Stitch" (Ohio 1974) 307 N.E.2d 911, app. dism. ___ U.S. ___ (43 U.S.L. Week 3569); State ex rel. Keating v. Vixen (Ohio 1971) 272 N.E.2d 137, vacated and remanded on other grounds, 413 U.S. 905, opn. on remand, 301 N.E.2d 880; State ex rel. Little Beaver Theatre, Inc. v. Tobin (Ct. App. Fla. 1972) 258 So.2d 30, 31-32; State v. Morley (N.M. 1957) 317 P.2d 317, 318-319.)

Each of the above cases either expressly or implicitly recognizes that the exhibition of obscene magazines or films constitutes a public nuisance properly subject to abatement. For example, the Georgia Supreme Court in Evans upheld application of a general public nuisance statute to an allegedly obscene film "I Am Curious (Yellow)." The court explained that '(i)f any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. There is little difference in

the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public. . . . The exhibition of an obscene motion picture is a crime involving the welfare of the public at large, since it is contrary to the standards of decency and propriety of the community as a whole. The welfare of the whole community is served by restraining the showing of such an obscene film." (180 S.E.2d at pp. 715-716.)

Evans was cited and discussed with approval in Paris, supra, 413 U.S. 49, 54-55, wherein the court expressly approved use of public nuisance actions to enjoin the exhibition of obscene materials. Since this portion of Paris is critical to our analysis, we quote it in its entirety:

"Georgia case law permits a civil injunction of the exhibition of obscene materials. (Citations, including Evans, supra.) While this procedure is civil in nature, and does not directly involve the state criminal statute proscribing exhibition of obscene material, the Georgia case law permitting civil injunction does adopt the definition of 'obscene materials' used by the criminal statute. Today, in Miller v. California, supra, we have sought to clarify the constitutional definition of obscene material subject

to regulation by the States, and we vacate and remand this case for reconsideration in light of Miller.

"This is not to be read as disapproval of the Georgia civil procedure employed in this case, assuming the use of a constitutionally acceptable standard for determining what is unprotected by the First Amendment. On the contrary, such a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation. (Citation.) Here, Georgia imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected. Thus the standards of (prior United States Supreme Court decisions) were met." (Italics added; Paris at pp. 54-55.)

Similarly, as we explain hereinafter, the California public nuisance statutes must be enforced in such a way as to operate in a constitutional fashion. So applied, as the foregoing cases make clear, there is no overriding principle of law which precludes the states from regulating the exhibition of obscene matter by application

of their public nuisance statutes. To this extent, Harmer v. Tonylyn Productions, Inc., supra, 23 Cal.App. 3d 941, is disapproved.

We do not suggest, of course, that law enforcement officers in each city and county in this state have a mandatory duty always and everywhere to abate the exhibition of obscene matter within their borders. The particular nature of the exhibition, and its effect upon the community, may vary considerably in time and place. Law enforcement officers accordingly are vested with wide discretion to decide whether or not to initiate the kind of formal abatement proceedings such as those instituted in the matters before us. (See Code Civ. Proc., § 731.) Once a community through its public officials has determined that a particular display of obscene materials amounts to a public nuisance which is injurious to the safety and morals of that community, no valid reason exists why, adequate constitutional procedural safeguards being met, the remedy of civil abatement proceedings must be denied such community. The availability of the public nuisance procedure may prove useful for those local entities which, determining that they are confronted with commercial exploitation of obscene materials resulting in the conditions contemplated in section 370, elect to use it.

We consider and will reject several constitutional objections raised by defendants.

Defendants first suggest that the statutory language "indecent, or offensive to the senses" (Pen. Code § 370) is impermissibly vague, requiring them to guess as to its meaning, and thus is violative of the First Amendment to the federal Constitution. Several cases involving similar language have avoided the constitutional problem by construing such language as synonymous with the word "obscene," as defined in the applicable statutes and case law. (See In re Giannini (1968) 69 Cal.2d 563, 571, fn. 4 ("lewd or dissolute conduct"); Silva v. Municipal Court (1974) 40 Cal.App.3d 733, 736-737 (same); Grove Press, Inc. v. Flask, supra, 326 F.Supp. 574, 578 ("lewd, indecent, lascivious or obscene"); Janus Films, Inc. v. City of Fort Worth (Tex. Ct. App. 1962) 354 S.W.2d 597, 600 ("indecent"); State ex rel. Ewing v. "Without A Stitch," supra, 307 N.E.2d 911, 914-915 ("obscene" construed in light of recent United States Supreme Court opinions); State ex rel. Cahalan v. Diversified Theat. (Mich. Ct. App. 1975) 229 N.W.2d 389, 393-394 ("lewdness").)

Furthermore, the United States Supreme Court recently emphasized within the foregoing context that courts have an obligation to construe statutes in such a way as to avoid serious constitu-

tional doubts. "If and when such a 'serious doubt' is raised as to the vagueness of the words 'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' or 'immoral' as used to describe regulated material (in federal statutes), we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in Miller v. California . . . ." (Italics added; United States v. 12 200-Ft. Reels of Film (1973) 413 U.S. 123, 130, fn. 7; accord, Hamling v. United States (1974) 418 U.S. 87, 114.) Indeed, in Bloom v. Municipal Court (1975) ____ Cal. 3d ____, ____, we have construed our own obscenity statute (Pen. Code, § 311, subd. (a) ("obscene matter")) as referring to the patently offensive matter set forth in Miller, supra, and have rejected the contention that the statute is unconstitutionally vague. (Accord, People v. Enskat (1973) 33 Cal.App. 3d 900.) We find no impediment to use of the remedy on grounds of statutory vagueness.

Defendants next assert that use of the public nuisance statutes to enjoin or otherwise abate the exhibition of films or magazines violates the constitutional principle against prior restraint of presumptively protected materials.

(See Southeastern Promotions, Ltd. v. Conrad (1975) 420 U.S. 546, 558; United States v. Thirty-seven Photographs (1971) 402 U.S. 363, 367; Freedman v. Maryland (1964) 380 U.S. 51, 58; Kinglsey Books, Inc. v. Brown (1957) 354 U.S. 436.) We note preliminarily that, as the foregoing cases make clear, prior restraints are not unconstitutional per se; a prior restraint may avoid constitutional infirmity if it occurs "under procedural safeguards designed to obviate the dangers of a censorship system." (Southeastern Promotions, Ltd., supra, at p. 559.) Among other safeguards, "a prompt final judicial determination must be assured." (Id. at p. 560.)

In order properly to evaluate defendants' prior restraint contention, we first review the possible forms of relief available to plaintiffs in an ordinary public nuisance action. The public nuisance statutes, unlike the Red Light Abatement Law, do not provide for such specific forms of relief as temporary and perpetual injunction (Pen. Code, §§ 11226-11227), removal and sale of fixtures, and closure of the premises for one year (Pen. Code, § 11230). Instead, the district attorney or city attorney is, in general terms, empowered to bring a civil action to "abate" the public nuisance. (Code Civ. Proc., § 731). Further, " 'An abatement of a nuisance is

accomplished in a court of equity by means of an injunction proper and suitable to the facts of each case. . . .' " (Italics added; Guttinger v. Calaveras Cement Co. (1951) 105 Cal.App.2d 382, 390; see generally McQuillin, Municipal Corporations, § 24.73.)

Thus, in the matters before us if the trial court finds the subject matter obscene under prevailing law an injunctive order may be fashioned that is "proper and suitable" in each case. It is entirely permissible from a constitutional standpoint to enjoin further exhibition of specific magazines or films which have been finally adjudged to be obscene following a full adversary hearing. (Paris Adult Theatre I v. Slaton, supra, 413 U.S. 49, 54-55 (approving Georgia abatement procedure); Grove Press, Inc. v. Flask, supra, 326 F.Supp. 574, 579; New Rivieria Arts Theatre v. State, supra, 412 S.W.2d 890, 893-895; State ex rel. Ewing v. "Without A Stitch", supra, 307 N.E.2d 911, 914; State ex rel. Little Beaver Theatre, Inc. v. Tobin, supra, 258 So.2d 30, 32; State ex rel. Keating v. Vixen, supra, 272 N.E.2d 137; see Commonwealth v. Guild Theatre, Inc. (Pa. 1968) 248 A.2d 45; Grove Press Inc. v. City of Philadelphia (3d Cir. 1969) 418 F.2d 82, 90-91; Sanders v. State, supra, 203 S.E.2d 153, 156-157.) The relevant principle derived from the foregoing

cases is that, except in extremely limited situations (see United States v. Thirty-seven Photographs, supra, 402 U.S. 363), no injunctive relief, whether temporary or permanent in nature, may be afforded until defendant has been given a a full and fair judicial hearing on the issue of obscenity, and an opportunity to obtain prompt judicial review of that issue by the state appellate courts.

We express no opinion upon the further question whether the court may, in addition, either close the premises entirely or enjoin further "obscene" exhibitions regarding materials not yet adjudged obscene. Several cases suggest that such further forms of relief would be appropriate and constitutionally permissible. (See People ex rel. Hicks v. Sarong Gals (1974) 42 Cal.App.3d 556, 562-563; Bloss v. Paris Township, supra, 157 N.W. 2d 260; Grove Press, Inc. v. Flask, supra, 326 F.Supp. 574, 578-580; Oregon Bookmark Corporation v. Schrunk (D. Ore.1970) 321 F.Supp. 639; State ex rel. Cahalan v. Diversified Theat., supra, 299 N.W.2d 389, 396-397; United Theatres of Florida, Inc. v. State ex rel. Gerstein (Fla. Ct. App. 1972) 259 So.2d 210, 212-213, vacated and remanded, 419 U.S. 1028.) Other cases have held that such relief would constitute an invalid prior restraint of

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presumptively protected materials (Gulf States Theatres of Louisiana, Inc. v. Richardson (La. 1973) 287 So.2d 480, 489; Mitchem v. State ex rel. Schaub (Fla. 1971) 250 So.2d 883, 886-887; New Rivieria Arts Theatre v. State, supra, 412 S.W.2d 890, 893-895; Sanders v. State, supra, 203 S.E.2d 153, 156-157; State ex rel. Little Beaver Theatre, Inc. v. Tobin, supra, 258 So.2d 30, 32; State ex rel. Ewing v. "Without A Stitch", supra, 307 N.E.2d 911, 917-918.) Since the United States Supreme Court has not yet spoken on this difficult question, and since in this posture of the case the issue is not before us, we leave the question open for further consideration.

Defendants finally maintain that since the public nuisance statutes are silent with respect to prior adversary hearings, this court should not undertake to "rewrite" those statutes to require such hearings. Such a contention lacks merit. We are obliged to construe and interpret legislation in a manner which will uphold its validity. (Braxton v. Municipal Court (1973) 10 Cal.3d 138, 145; In re Kay (1970) 1 Cal.3d 930, 941-942.) Thus, the courts have held that provision for a prior adversary hearing may be implied by law in otherwise silent statutory provisions. (State ex rel. Little Beaver Theatre, Inc. v. Tobin, supra, 258 So.2d 30, 31-32; see United States v.

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Thirty-seven Photographs, supra , 402 U.S. 363, 367-373.) As hereinabove expressed, abatement of a nuisance is accomplished by means of a "proper and suitable" injunction. In the context of assertedly obscene magazines and films, a "proper" injunction ordinarily is one that is issued after the requisite adversary hearing has taken place.

We emphasize that the proceedings now before us remain at the pleading stage. Having determined that plaintiffs' complaint is sufficient to state a cause of action based upon a general nuisance theory, we consider it inappropriate to describe in detail the precise dimensions of the injunctive and other relief which might be suitable in this and the related cases. It is enough that the parties and the trial court recognize that substantial constitutional issues are presented in this litigation, and that care must be exercised to assure that defendants' constitutional rights are not infringed. More than this is not required.

2. Red Light Abatement Law

As an alternative theory of relief, plaintiffs allege that defendants' exhibition of obscene magazines and films constitutes a nuisance subject to abatement under the provisions of the Red Light Abatement Law (Pen. Code, § 11225 et seq.). We have previously noted that these provisions pre-

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scribe certain specific forms of relief not available under the general nuisance statutes, including temporary injunctions, removal and sale of fixtures, and closure of the premises for one year. (Pen. Code, §§ 11227, 11230.)

The Red Light Abatement law defines as a nuisance "(e)very building or place used for the purpose of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution. . . ." (Italics added.) Defendants maintain that the term "lewdness" does not include the exhibition of obscene magazines or films in bookstores or theaters. We agree.

The law was passed in 1913 and, as its name indicates, its primary purpose was to regulate ". . . houses of ill fame, . . . and other like places, where acts of lewdness and prostitution are habitually practiced and carried on as a business." (People v. Barbiere (1917) 33 Cal. App. 770, 775.) It has been held that the terms "lewdness, assignation, or prostitution" were "obviously" intended to refer to "illicit sexual acts or conduct amounting to or involving lewdness." (People v. Arcega (1920) 49 Cal.App. 239, 242.) The term "lewdness" is not synonymous with "prostitution" and has a broader significance, including "all other immoral or degenerate conduct or conversation between persons of opposite sexes,

. . ." including the solicitation of sexual acts to be performed elsewhere. (People v. Bayside Land Co. (1920) 48 Cal.App. 257, 260.)

The consensus of more recent cases is that the term "lewdness" is broad enough to include live lewd entertainment, such as stage shows or other exhibitions featuring obscene performances. (People ex rel. Hicks v. Sarong Gals (1972) 27 Cal.App.3d 46, 50, subsequent opn., supra, 42 Cal.App.3d 556, 559; Harmer v. Tonylyn Productions, Inc., supra, 23 Cal.App.3d 941, 944; Maita v. Whitmore (N.D.Cal. 1973) 365 F.Supp. 1331.) Yet no California case has yet held that the Red Light Abatement Law was intended to apply to the exhibition of obscene magazines or films. As stated in Harmer: "If the Legislature had desired or intended by section 11225 of the Penal Code to regulate the showing of pornographic films, pictures or drawings, such subject matter could have been included in section 11225 when it was recently amended in 1969, as it did when it chose to enumerate 'illegal gambling as defined by state law or local ordinance' in that section of the Penal Code." (23 Cal.App.3d at p. 944.) On the other hand, it has been forcefully contended that "it borders upon the absurd to apply the law to live stage shows and exhibitions that are lewd and to deny its application to motion

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pictures that are patently lewd and obscene." (Id., at p. 952 (dis.opn.); see also People ex rel. Hicks v. Sarong Gals, supra, 27 Cal.App.3d at p. 50.)

The courts of other states have generally agreed that "red light" laws do not apply to the exhibition of obscene books or films. (People v. Goldman (Ill. App. Ct. 1972) 287 N.E.2d 177; Gulf States Theaters of Louisiana, Inc. v. Richardson, supra, 287 So.2d 480; Southland Theatres, Inc. v. State (Ark. 1973) 492 S.W.2d 421; State v. Morley, supra, 317 P.2d 317, 318-320.) On the other hand, the most recent case on the point holds that the term "lewdness" in Michigan's "red light" act is broad enough to include the exhibition of films which are obscene under the standards set forth in Miller v. California, supra, 413 U.S. 15, 25. (State ex rel. Cahalan v. Diversified Theat., supra, 299 N.W.2d 389, 393.)

Although the question is not free from doubt, in view of the history of the Red Light Abatement Law and the uniform interpretation given it by the courts of this state, we conclude that the act's provisions were not intended to apply, and do not apply, to the exhibition of obscene magazines or films.

The judgment is reversed and the cause

remanded for further proceedings consistent with this opinion.

RICHARDSON, J.

WE CONCUR:

McCOMB, J.
SULLIVAN, J.
CLARK, J.

C O P Y

BUSCH V. PROJECTION ROOM THEATRE

L.A. 30432 to L.A. 30436 (Inclusive)

DISSENTING OPINION BY TOBRINER, J.

The majority today empowers city attorneys to bring actions to abate the sale or display of purportedly obscene material as a public nuisance, even when such sale or display occurs wholly within the confines of an adult bookstore or theatre and thus in no way afflicts those members of the community who would find it offensive. By permitting a city attorney who objects to certain material to wield this drastic remedy --a remedy designed for those rare cases where any delay would concretely imperil the public interest -- the majority endangers freedom of expression to an extent never before contemplated in this state. The owner of every bookstore, market, drugstore, airport, or other business place which sells "Playboy," "Playgirl," or similar publications must henceforth labor beneath the Damocles sword of public nuisance: if a city attorney decides that a single picture in one of those magazines is obscene, and so convinces a single judge, the owner may be compelled to

close his place of business or to discontinue the sale of materials that have never been judged obscene.

This court could not, without abdicating its responsibility to secure the rights provided by the federal and state Constitutions, sanction a legislative decision to endow a city attorney with so onerous and clumsy a weapon in his attempt to purge the private viewing of exhibitions he deemed "indecent." The vagueness of the prescribed conduct and the prior restraint on First Amendment activity would render such a law doubly vunerable to constitutional challenge.

As we shall point out, however, this case may be resolved on grounds other than that the Legislature exceeded constitutional bounds when it enacted the public nuisance laws; those laws simply do not confer upon the city attorney the power that the majority today bestows upon him. As drafted by the Legislature, the public nuisance laws provide an extraordinary remedy for situations that truly demand one; it is only as rewritten by the majority that these laws trench upon constitutional rights.

Courts of equity enjoy no roving commission to define public nuisances; they may abate only such nuisances as the Legislature declares. In People v. Lim (1941) 18 Cal.2d 872, 881, we

acknowledged that "the responsibility for establishing those standards of public morality, the violations of which are to constitute public nuisances within equity's jurisdiction, should be left with the legislature."[1/] Our charge,

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1/ The judicial reluctance to proclaim new species of public nuisance is well founded. The remedy of abatement, fashioned as it was to equip the courts to deal expeditiously with serious perils to the public, denies the defendant many of the procedural safeguards he would enjoy if he were subjected to an ordinary civil or criminal action. "(I)t is apparent that the equitable remedy has the collateral effect of depriving a defendant of the jury trial to which he would be entitled in a criminal prosecution for violating exactly the same standards of public policy. The defendant also loses the protection of the higher burden of proof required in criminal prosecutions and, after imprisonment and fine for violation of the equity injunction, may be subjected under the criminal law to similar punishment for the same acts. For these reasons equity is loath to interfere where the standards of public policy can be enforced by resort to the criminal law, and in the absence of a legislative declaration to that effect, the courts should not broaden the field in which injunctions against criminal activity will be granted." (People v. Lim, ante, 18 Cal.2d 872, 880 (citations omitted.))

That the majority opinion denudes the defendants of their rights to have a jury determine whether the exhibitions are actually obscene proves particularly distressing. In Bloom v. Municipal Court (1976) ___ Cal.3d ___, a majority of this court incorporated into the definition

(footnote continued on next page)

consequently, is a limited one: we must ascertain whether the Legislature has declared that the conduct complained of in the present case constitutes a public nuisance.

It has not. The public nuisance statutes do not embrace conduct whose tangible effects are limited to a small group of consenting adults. A careful reading of the statutes discloses that they govern only public nuisances -- that is, only those nuisances that bear concretely upon the health or senses of a substantial number of people. The statutory language supports this conclusion in two ways.

First, only such indecent behavior as assaults the senses of the community constitutes a public nuisance. The majority bases its contrary conclusion on section 370 of the Penal Code which defines a public nuisance to be anything "which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property. . . ." The majority argues

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of obscenity in section 311 of the Penal Code the guidelines set forth in Miller v. California (1972) 413 U.S. 15. Central to the Miller test is whether "the average person, applying contemporary community standards" would find that the work appeals to the prurient interest. The jury, as a microcosm of the community, is the only vehicle fit to conduct that inquiry.

that this language recognizes four classes of conduct that may constitute a public nuisance: conduct that is (a) injurious to health; (b) indecent; (c) offensive to the senses; or (d) an obstruction to property. Since indecency is a ground for finding a public nuisance quite apart from offense to the senses, the argument goes, the statute subsumes even private indecency which has no impact upon the senses of the community as a whole.

The majority's error is fundamental: it construes the wrong statute. Although sections 370-372 of the Penal Code govern the criminal dimension of public nuisances, section 731 of the Code of Civil Procedure governs their abatement. That section provides that "(a) civil action may be brought . . . to abate a public nuisance, as the same is defined in section three-four hundred and eighty of the Civil Code. . . ." (Emphasis added.) Although the majority alludes to the "substantial identity" of the Penal Code and Civil Code definitions, I find them different in one pivotal respect.

Since section 3480 of the Civil Code merely provides that "a public nuisance is one which affects at the same time . . . any considerable number of persons," we must refer to the definition of nuisance set forth in the preceding

section. Section 3479 of the Civil Code defines a nuisance to be anything "which is injurious to health, or is indecent or offensive to the senses, or an obstruction of the free use of property. . . ." (Emphasis added.) The difference between this definition and that contained in the Penal Code is subtle, but crucial. The phrase "to the senses" in section 370 of the Penal Code modifies only the word "offensive"; here, it modifies both indecent and offensive. According to the Civil Code, therefore, indecent conduct is a public nuisance only when it is "indecent . . . to the senses" of a substantial number of people. Consequently, a court may not abate a public nuisance unless it assaults the senses, not merely the sensibilities or tastes, of the community.[2/]

2/ This argument, admittedly, lets a great deal turn on the absence of a comma in Civil Code section 3479, but the majority lets an equal amount turn on the presence of a comma in section 370 of the Penal Code. Since the statute authorizing the abatement of nuisances explicitly refers to the Civil Code definitions, there can be no doubt that we are to construe the section that lacks the comma. It is quite likely, of course, that this difference in punctuation between the two sections is accidental, and that their drafters intended their scope to be coextensive. This court, consequently, might reasonably decide to interpret the sections identically, notwithstanding their different punctuation.

That the private sale or display of obscene material may not be abated as a public nuisance is thus manifest. Such materials do not impact "at the same time" on the senses of a "considerable number of people." (Civ. Code, § 3480.) The result would be different if the purportedly obscene materials were flaunted on a public billboard. In that event, the indecent behavior or object would simultaneously affect the senses of a large group. But where the purportedly indecent behavior occurs in private, the mere

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Which section, however, contains the error and which section is correct? It is difficult to ascertain the intent that motivated the Legislature when it enacted these statutes in 1872 and amended them in 1874; any conclusion that one rather than the other involved the error in punctuation, therefore, is fraught with uncertainty. Nonetheless, if we must choose which section is correct, we should honor the definition embodied in the Civil Code. The fact that section 731 of the Code of Civil Procedure refers to the Civil Code definitions gives some indication that those definitions comport with the Legislature's wishes. Moreover, the preferences for narrowly construing statutes that infringe first amendment values and for interpreting statutes in light of the consequences of the alternative constructions, see infra, conjoin to urge that we embrace the Civil Code definitions. These considerations, I grant, do not conclusively establish that the Civil Code definition accurately reflects the legislative intent; there are no reasons, however, to prefer the definition contained in the Penal Code.

fact that even a large portion of the public disapproves of it fails to bring it within the purview of the public nuisance abatement statute.[3/]

The public nuisance statutes do not comprehend the private sale or display of obscenity for yet a second reason. The requirement that a public nuisance "interfere with the comfortable enjoyment of life or property" (Civ. Code, § 3479; Pen. Code, § 370) effectively excludes private behavior from the purview of the public nuisance statutes. In the present case, for example, the purportedly obscene exhibitions themselves in no way interfere with the comfortable enjoyment of life of those who do not enter the adult book stores or theatres; the materials do not obtrude upon those who never see them. Consequently, the necessity that the nuisance interfere with the comfortable enjoyment of life infuses both

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3/ The majority insists that conduct that is indecent does not offend any of the five senses, and thus that the use of the word "indecent" in the statute establishes that the public nuisance laws encompass conduct that does not bear upon the senses. (Ante, at p. ___*.) The answer is simple: even though conduct that is indecent does its damage to the sensibilities or tastes, rather than the senses, of the public, it falls within the public nuisance statute only when perceived by the senses of a substantial number of people.

*Majority opinion at page 9.

the Penal and Civil Codes with the requirement of public behavior that the phrase "indecent . . . to the senses" independently imports to the latter.

It might be argued that although the obscene materials themselves do not affect the lives of those who do not view them, the knowledge that there are stores or theatres that sell or display such materials does interfere with the comfortable enjoyment of life of a considerable number of people. So attenuated a discomfort, however, is far too meager to command the protection of the public nuisance statutes. There is no hint in the statutes or the cases construing them that conduct can constitute a public nuisance simply because some people stand philosophically opposed to it; the courts have demanded that conduct impinge more concretely upon a substantial number of people before branding it a public nuisance.

In People v. Robin (1943) 56 Cal.App.2d 885, 889, the court held that "the unlawful sale of liquor, of itself, . . . does not constitute a nuisance within the terms of section 3479, Civil Code. . . ." Since violating the laws regulating the sale of liquor is presumably as indecent as violating the laws regulating the sale of obscene material, the court

implicitly ruled that the mere fact that certain behavior runs afoul of society's preferences -- even as articulated in its criminal laws -- constitutes an inadequate basis for holding it a public nuisance.

In People v. Seccombe (1930) 103 Cal.App. 306, the court declined to abate the practice of usury as a public nuisance. It observed: "It is very evident that if following the despicable calling of userer constitutes a public nuisance (as defined in Civil Code section 3479) it must be because such conduct constitutes 'an obstruction to the free use of property.' . . . It could not by any stretch of the imagination be considered as covered by any other clause of the code definition." (103 Cal.App. at p. 310.) (Emphasis added.) The court's language left scant doubt that it thought that engaging in "the despicable calling of userer" smacked of indecency. Nonetheless, it expressly ruled that the practice could not qualify as a nuisance on the grounds that it was indecent or offensive to the senses of a large number of people.

In Dean v. Powell Undertaking Co. (1921) 55 Cal.App. 545, the court refused to abate the operation of a funeral parlor in a residential neighborhood as a public nuisance. The plaintiffs had complained that the operation of such an

establishment precluded the comfortable enjoyment of life for many residents who were squeamish about the proximity of dead bodies. The court explained that the plaintiffs deserved relief only if they could establish that the funeral parlor omitted noxious odors or otherwise afflicted the senses of the aggrieved parties, and that merely offending the sensibilities of some people would not render it a public nuisance. The Dean court quoted with approval the language of the New Jersey Court of Chancery in Wescott v. Middleton (1887) 43 N.J. Eq. 478, 486: "In this case, then, we have the broad, yet perfectly perceptible or tangible ground or principle announced that the injury must be physical as distinguished from one purely imaginative; it must be something that produces real discomfort or annoyance through the medium of the senses, not from delicacy of taste or refined fancy. . . ."

The Court of Appeal most recently addressed this issue in Harmer v. Tonylyn Productions Inc. (1972) 23 Cal.App.3d 941, in which private citizens brought an action pursuant to section 3493 of the Civil Code to enjoin the showing of a purportedly obscene film as a public nuisance. As the majority notes, Harmer ruled that the plaintiffs had not alleged the special damages

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that section 3493 requires of private citizens who would bring an action to abate a public nuisance. In so holding, however, the court explicitly rejected the contention that the statutory language embraced such a private exhibition.

The Harmer court observed: "The film involved was shown only in a closed theatre. . . . Thus, only those members of the community were exposed to the film who voluntarily chose to see it. This is not a case where the community as a whole is forced to submit involuntarily to vile odors or air pollution or to the unwelcome presence of animals. In the statute's terms, the alleged nuisance at bench did not '. . . affect(s) at the same time an entire community or neighborhood. . . .' (Civ. Code, § 3480) (italics added)." (Citations omitted.) The court thus squarely rejected the notion that the mere existence of an establishment that deals in obscene materials constitutes a public nuisance, for if private indecent behavior fell within the public nuisance statute, the entire community would have been affected in Harmer.

The majority contends that Harmer improperly analyzed the character of the state interest in regulating the exhibition of obscene matter; it observes that Paris Adult Theatre I v. Slaton (1973) 413 U.S. 49 and People v. Luros (1971)

4 Cal.3d 84, both recognize a legitimate state interest in regulating the distribution of obscene material to consenting adults. But those decisions merely testify to the outer limits of constitutional state regulation; they do not testify to the actual ambit of California's public nuisance laws. Harmer correctly construed the California statutes. The majority cannot rebut that construction by merely noting that, under prevailing constitutional doctrine, the Legislature stands empowered to draft more expansive statutes.

In support of its conclusion that the public nuisance statutes comprehend private indecent behavior, the majority relies primarily upon Weis v. Superior Court (1916) 30 Cal.App. 730, which involved the indecent exposure of women in an exhibit at the 1915 Panama-California International Exposition. In a three-and-one-half-page opinion the court ruled that it could abate the exhibition as a public nuisance in order to subserve the public morals and protect "men, women, and children attending this resort as spectators from being subjected to witnessing the offensive and indecent exhibition." (30 Cal.App. 733.)

Weis constitutes meager support for the expansion of the public nuisance statutes that

the majority today effects. It is not at all clear that spectators were adequately forewarned of the character of the exhibition involved in Weis. Although the exhibition's name might have given some hint of its nature, spectators could reasonably have assumed that the "Sultan's Harem" involved something less than actual nudity. Nor is there any indication that the manager of the exhibit attempted to convey its content to possible spectators by making it an "adults only" attraction; the court explicitly referred to the need to protect children from the exhibition. To the extent that Weis involved subjecting an unadmonished audience to indecent material, it has no bearing on the present case in which the allegedly indecent material was display exclusively within the confines of an "adults only" establishment.

The majority also attempts to cull support from People v. Lim, supra, 18 Cal.2d 872, which, it maintains, "approves the reasoning" of Weis. (Ante, at p. __*.) As noted above, however, it is not at all clear that the reasoning or the holding of Weis extends to truly private conduct. Lim itself did not involve indecency or obscenity, but a gambling establishment which, the complaint alleged, "draws together great

*Majority opinion at page 7.

numbers of disorderly persons, disturbs the public peace, brings together idle persons and cultivates dissolute habits among them, creates traffic and fire hazards, and is thereby injurious to health, indecent and offensive to the senses and impairs the free enjoyment of life and property." We held simply that "crowds of disorderly people who disturb the peace and obstruct the traffic may well impair the free enjoyment of life and property and give rise to the hazards designated in the statute." (18 Cal.2d at p. 882.) Needless to say, the concrete interference with the public peace in Lim is quite distinct from the private behavior involved in the present case.

A careful study of the statutes and the cases thus impels the conclusion that the public nuisance statutes do not govern indecent conduct when such conduct is not thrust upon those who find it repugnant. The potent remedy of abatement is reserved for objects and behavior that concretely interfere with the enjoyment of life of a considerable number of people; to the extent that private indecent behavior offends the sensibilities of members of the community, they must rely on their public officials to enforce any apposite criminal laws.

Recent expressions of legislative and

popular will reinforce my conclusion that the public nuisance statutes do not govern private conduct. As explained above, Harmer v. Tonylyn Productions, Inc., ante, 23 Cal.App. 3d 941, ruled that California's public nuisance statutes did not embrace the sale or display of obscene material under circumstances in which such materials are exposed only to willing viewers. Following Harmer, several attempts were made legislatively to overrule the decision; the voters and legislators of this state rebuffed each attempt to establish public nuisance abatement procedures directed at obscenity.

In the 1972 general election, the electorate rejected by a vote of about two to one an initiative measure that would have endowed the district attorney of any county with the authority to maintain an action for an injunction in superior court to prevent the display or sale of obscene material.[4/] In June 1974, the

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4/ The relevant portions of the initiative (Proposition 19) read:

"CHAPTER 7.9. INJUNCTIVE RELIEF

"313.50. The superior courts of the State of California have jurisdiction to enjoin the sale or distribution of any book, magazine, or any other publication or article, or the public showing of any motion picture film, slide, exhibit, or performance which is prohibited under Chapters 7.5, 7.6, 7.7 or 7.8 of this title.

"313.51. The district attorney of any

county in this state in which a person, firm, or corporation sells or distributes, or is about to sell or distribute, or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, newspaper, story paper, writing paper, picture, card, drawing, photograph, or other publication or matter which is prohibited by the above enumerated chapters may maintain an action for an injunction against such person, firm, or corporation in the superior court to prevent the sale or further sale or the distribution or further distribution of any such prohibited publication or articles.

"313.52. The district attorney of any county in this state in which a person, firm, or corporation shows publicly, or is about to show publicly, or is about to acquire possession with intent to show publicly any motion picture film, slide, exhibit, or performance which is prohibited under the above enumerated charters may maintain an action for an injunction against such person, firm, or corporation in the superior court to prevent the public showing or further public showing of such prohibited matter or activity.

"313.53. The person, firm, or corporation sought to be enjoined is entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days after the conclusion of the trial.

"313.54. In the event that an order or judgment be entered in favor of the district attorney and against the person, firm, or corporation sought to be enjoined, such final order or judgment shall contain a provision directing the person, firm, or corporation to

(footnote continued on next page)

similar provisions in Assembly Bill No. 4340.[5/]

surrender to such peace officer as the court may direct or to the sheriff of the county in which the action was brought any of the matter described in Section 313.51 or 313.52, and such sheriff or officer shall be directed to seize and destroy the same, provided that destruction of such matter shall be stayed until after the time provided for filing a notice of appeal has expired, and provided further that where an appeal is timely filed, such destruction shall be stayed pending the decision on appeal."

Proposition 19 was defeated by a vote of 5,503,888 (67.9 percent) No to 2,603,927 (32.1 percent) Yes. Secretary of State, Statement of Vote, General Election November 7, 1972, page 30.

5/ The relevant portions read: "311.3(a) The superior court has jurisdiction to enjoin the sale, distribution or exhibition of obscene books, articles or films, as hereinafter specified:

"(1) The district attorney, county counsel, city attorney or city prosecutor of any county, city or town, in which a person, firm or corporation sells, distributes or exhibits or is about to sell, distribute or exhibit or has in his possession with intent to sell, distribute or exhibit any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, film figure, image or any written or printed matter of an indecent character which is obscene as defined in Section 311, may maintain an action for an injunction against such person, firm or corporation in the superior court to prevent the sale or further sale or the distribution or further distribution or the exhibition or further exhibition of such matter.

"(2) The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within 14 days after joinder of issue and a decision shall be rendered by the court

In light of the Harmer decision, and the subsequent rejection of proposed legislation which would have specifically authorized a nuisance abatement procedure to be used against obscenity, traditional canons of statutory construction teach that the existing nuisance provisions should not be judicially extended to encompass the display of allegedly obscene material to willing viewers. " 'Where a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it. (Citations.)' (People v. Hallner, 43 Cal.2d 715, 719; People v. Courtney, 176 Cal.App.2d 731, 741.) This rule is not rendered inapplicable by the fact that the determinative decision is rendered by a Court of

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within two days of the conclusion of the trial.

"(b) In the event that a final order or judgment of injunction be entered in favor of such officer of the county, city or town and against the person, firm or corporation sought to be enjoined, such final order of judgment shall contain a provision directing the person, firm or corporation to surrender to the sheriff or any other law enforcement agency of the county in which the action was brought any of the matter described in paragraph (1) hereof and such sheriff or law enforcement agency shall be directed to seize and destroy the same or to hold the same as evidence."

Appeal." (People v. Orser (1973) 31 Cal. App.3d 528, 533-534, fn. 4.)

Properly construed, the public nuisance statutes do not embrace private indecency such as involved in the present case. Our inquiry would normally end here. Given the majority's conclusion that these statutes do encompass such private behavior, however, it becomes necessary to assay them by constitutional standards. As construed by the majority, the public nuisance statutes fail to pass constitutional muster for several reasons.

First, the statutes, as interpreted today, contravene the First Amendment because they chill protected expression. As I have explained in detail elsewhere, the concept of obscenity is an inherently vague one, and no legislative or judicial efforts that even arguably comport with the First Amendment could define the term with sufficient precision to enable business persons confidently to determine whether their products or exhibitions would be ruled obscene. (Bloom v. Municipal Court (1976) ___ Cal.3d ___ (Tobriner, J., dissenting).) The problem of defining obscenity is intractable because we have no community view of that which appeals to the prurient interest and lacks social value, but rather a host of distinct views within each community.

And even if these distinct views could be said to metaphysically coalesce to form some community standard, no trier of fact could confidently ascertain what that standard was.

The determination by a judge or juror that an exhibition is obscene, consequently, amounts to nothing more than a testament to his subjective preferences or a conjecture about the taste and fancy of his neighbors. As the Court of Appeal acknowledged in In re Davis (1966) 242 Cal.App.2d 645, 661, when it held a law proscribing "any act which openly outrages public decency" impermissibly vague, "(t)he constitution . . . could not tolerate a law which would make an act a crime, or not, according to the moral sentiment which might happen to prevail with the judge and jury. . . ."

Although we do not deal here with a criminal law, the vice of vagueness remains fatal. The United States Supreme Court explained: "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech and of the press suffer." (Ashton v. Kentucky (1966) 384 U.S. 195, 200.) The essential inquiry, then, is whether the vaguely crafted law will discourage

protected speech. There can be no doubt that the use of the public nuisance statutes to suppress obscenity will throttle expression which would not be adjudged obscene.

Vague criminal laws chill protected expression because some people, reluctant to risk criminal penalties, refuse to deal with any materials or engage in any expression that might be deemed unprotected by First Amendment. The use of the public nuisance laws to regulate obscenity will also entail the suppression of protected materials because of the awesome risks associated with being branded a public nuisance. The majority empowers the trial court to decide whether it should "close the premises entirely or enjoin further 'obscene' exhibitions regarding materials not yet adjudged obscene." A prudent business person is not likely to exhibit material that he thought was protected by the First Amendment when, if a particular judge disagreed with him,[6/]

6/ The fact that the public nuisance statutes relegate the decision to a judge, rather than to a jury, exacerbates the chilling effect. A dealer in protected material who might have been confident that no group of 12 jurors would unanimously conclude that his material offended the community standards might find himself inhibited by the greater uncertainty of how a single member of the community -- the judge -- would react to it.

he might have to endure not merely the suppression of that material, but the closing of his place of business.

The spectre of the application of these severe remedies, when combined with the inherent uncertainty as to that which constitutes obscenity, will thus entail a genre of private censorship as repugnant to the values underlying the First Amendment as censorship by the state itself. It will "tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded." (Smith v. California (1959) 361 U.S. 147, 153-154.) Any law that attempts to regulate the exhibition or sale of obscene material to consenting adults will necessarily beget this noxious private censorship to some degree.

The public nuisance laws, as enlarged by the majority, suffer from a second constitutional infirmity: they constitute an illegal prior restraint of expression. In the present case, the plaintiffs entreat the trial court not only

to enjoin the sale or exhibition of materials actually adjudged obscene, but to forbid the sale or exhibition of other materials prior to any determination that they are obscene. Moreover, they urge the trial court to close down a business -- and thereby suppress all materials that the business would have sold or exhibited -- if the court finds that the business has in the past sold or exhibited some obscene material. The majority, by refusing to foreclose these remedies, sanctions the subversion of a cardinal tenent of First Amendment doctrine: materials are presumptively protected by the First Amendment and their sale or exhibition will not ordinarily be suppressed prior to a final determination that, in fact, they are unprotected.

Although the United States Supreme Court has never declared prior restraints unconstitutional per se, it has acknowledged that a system of prior restraint "comes to this Court bearing a heavy presumption against its constitutional validity." (Bantam Books, Inc. v. Sullivan (1963) 372 U.S. 58, 70.) As that high court has explained: "The presumption against prior restraints is heavier -- and the degree of protection broader -- than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory etched deeply in our

law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." (Southeastern Promotions, Ltd. v. Conrad (1975) 420 U.S. 546, 558-559.)

That prior restraints are antithetical to the values emobdied in the First Amendment is rendered clear by the facts of one of the cases decided today, People ex rel. Busch v. Jason's Books. The bookstore involved sells thousands of books and magazines, and the plaintiffs only allege that 30 percent of the books and 20 percent of the magazines are "hardcore." Presumably, 70 percent of the books and 80 percent of the magazines are not obscene and, therefore, are protected by the First Amendment. Yet the majority would permit a trial court to close down the entire bookstore and thereby suppress the bulk of the publications sold there, notwithstanding the fact that no one alleges that they are obscene. And even if the trial court judiciously refrains from closing the bookstore entirely, the majority permits it to enjoin the

sale of particular books or magazines prior to any pronouncement upon their obscenity or social worth.

Because prior restraints critically endanger free expression, they will survive constitutional scrutiny only when they occur "under procedural safeguards designed to obviate the dangers of a censorship system." (Southeastern Promotions, Ltd., supra, at p. 559.) In Southeastern Promotions, the court reaffirmed its ruling in Freedman v. Maryland (1965) 380 U.S. 51, 58, that a prior restraint on expression is constitutionally defective unless it is "imposed only for a specified brief period and only for the purpose of preserving the status quo" pending a final judicial pronouncement on the material's obscenity. (420 U.S. at p. 560.) The public nuisance laws provide no such guarantees.

In the present cases the complaints urged the court to close the premises for one year. While the time period is specified, it cannot reasonably be deemed brief. Moreover, the request for such relief is not based upon the need to preserve the status quo pending adjudication of the obscenity of the other materials. Indeed, as I observed above, there is absolutely no allegation that certain of the materials that would be suppressed are obscene. And even if

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the trial court enjoined the sale of only those materials that were allegedly obscene, there is no guarantee of the prompt final judicial determination of obscenity that the federal cases require. In sum, prior restraints such as the plaintiffs seek and the majority permits are blatantly unconstitutional because they are unaccompanied by those specific procedural safeguards that the United States Supreme Court has held necessary to overcome the presumed illegality of prior restraints. 7/

That the public nuisance statutes do not provide such procedural safeguards should not be surprising. As I have argued above, they simply were not drafted for the purpose to which the majority commits them. The sword of public nuisance is a blunt one, admirably designed to

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7/ The majority circumvents another procedural problem by importing to the statutes a requirement of a prior adversary hearing. The majority justifies this judicial rewriting of the statute by referring to the principle that laws should be construed so as to uphold their validity. There is, however, an alternative way to construe the statutes involved in this case so as to render them immune to constitutional attack: they can be interpreted as inapplicable to private behavior. Given that the applicability of the statute's language to private behavior is, at best, highly dubious, this reading would seem the more judicious way to construe the statute so as to uphold its validity.

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curb noxious odors or to quell riots, but ill suited to the delicate sphere of the First Amendment where legal overkill is fatal.

Because the public nuisance statutes do not govern the willful viewing of obscene material in private by adults -- and because if they did they would be constitutionally defective -- I conclude that the trial court properly sustained the defendant's demurrer. Accordingly, I would affirm the decision below.

TOBRINER, J.

WE CONCUR:

Wright, C.J.
Mosk, J.